No. 2014

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SOCIETE NOUVELLE d'ARMEMENT,

Plaintiff in Error,

vs.

J. R. BARNABY,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Met. Press

No.

In the District Court of the United States

For the Western District of Washington
Northern Division

SOCIETE NOUVELLE d'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

JAMES KIEFER, ESQ.,
Attorney for Defendant and Plaintiff in Error,
Suite 327 Colman Building, Seattle, Washington.

WILLIAM H. GORHAM, ESQ.,
Attorney for Plaintiff and Defendant in Error,
653 Colman Building, Seattle, Washington.

INDEX OF PRINTED TRANSCRIPT OF RECORD

In the District Court of the United States for the Western District of Washington. Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No.....

Complaint.

The plaintiff complains and alleges:

I.

That he is a citizen of the United States of America and a resident of the City of Seattle in the State of Washington.

II.

That during all of the times herein mentioned the defendant was and is a corporation organized and existing under the laws of the Republic of France; and for more than three years last past has maintained and is maintaining a line of vessels plying with reasonable regularity in the carrying trade between the ports of the state of Washington, on Puget Sound, and foreign ports, importing and exporting general cargoes to and from ports in said state and during said three years last past has maintained and is now maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said state.

III.

That between the 29th day of October, 1910, and the 6th day of June, 1912, in the state of Washington and the Province of British Columbia, in the Dominion of Canada, plaintiff rendered services as a ship's agent to the defendant, at its special instance and request, in writing.

IV.

That the reasonable value and worth of said services is the sum of five thousand ($5,000.00) dollars.

V.

That defendant has not paid the same nor any part thereof, although plaintiff has demanded payment from defendant therefor.

Wherefore, plaintiff demands judgment against said defendant in the sum of five thousand ($5,000.00) dollars, together with interest at the legal rate from the 6th day of June, 1912, and for his costs and disbursements herein.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

(*Indorsed:*) Complaint filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 9, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

UNITED STATES OF AMERICA:

In the United States District Court for the Western District of Washington. Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Summons.

The President of the United States of America, Greeting: To the above named defendant: Societe Nouvelle d'Armement—

You are hereby required to appear in the United States District Court, in and for the Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above named plaintiff, now on file in the office of the Clerk of said Court, in the City of Seattle, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

Witness the Hon. Jeremiah Neterer, Judge of said Court, this 9th day of February, in the year of our Lord, one thousand nine hundred and sixteen, and of our independence the one hundred and fortieth.

(SEAL) FRANK L. CROSBY,
Clerk.

By ED M. LAKIN, *Deputy Clerk.*

Marshal's Return.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss.

I hereby certify and return that I served the within summons on the therein-named Societe Nouvelle d'Armement, by serving Charles Jolivet, Agent, by handing to and leaving a true and correct copy thereof with Charles Jolivet, Agent, personally, at Seattle, Wash., in said District, on the 9th day of February, A. D. 1916.

JOHN M. BOYLE, *U. S. Marshal.*

By EDWARD WILLIAMS, *Deputy.*

Marshal's Fees, $2.12.

(*Indorsed:*) Summons. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 14, 1916. Frank L. Crosby, Clerk. E. M. Lakin, Deputy.

In the United States District Court, in and for the Western District of Washington. Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Answer.

Comes now the defendant and answering the complaint of the plaintiff herein, says and alleges:

I.

Said defendant denies each and every allegation contained in paragraph three of said complaint, except that he admits that at the request of the defendant, the plaintiff performed certain services in regard to ships business at about the times mentioned in plaintiff's complaint.

II.

Said defendant denies each and every allegation contained in the fourth and fifth paragraphs of said plaintiff's complaint.

And for a first affirmative and separate defense, this defendant says and alleges:

I.

That on the 22d day of October, 1914, the plaintiff herein began an action in the Superior Court of King County, Washington, being No. 104,397 of the files of said court, against this defendant for the same cause of action, for the same services and upon the same contract, pleaded and relied upon by the plaintiff herein and covering the same transactions, and in said cause, this defendant appeared and issue was joined therein and trial had so that on the 18th day of May, 1915, a judgment was entered in said Superior Court, in said cause, in favor of the plaintiff and against this defendant in the sum of $1081.000 and plaintiff's costs and said judgment was thereafter fully paid and satisfied by this defendant.

II.

That in order to sustain his cause of action in said suit in said Superior Court, the plaintiff offered evidence of the same transactions as are referred and relied upon herein, and in plaintiff's bill of particulars filed herein and all the matters mentioned in plaintiff's complaint herein and in his bill of particulars herein, were litigated and should have been litigated in said action in said Superior Court.

And for a second affirmative complaint, defendant says and alleges:

I.

That this action was not begun or commenced within the time limited by the statutes of the State of Washington for the commencement of said action, to-wit: within three years from the rendition of the services sued for.

Wherefore, defendant demands that plaintiff's complaint be dismissed; that he take nothing thereby, and that this defendant recover his costs and disbursements herein.

JAMES KIEFER,
Attorney for Defendant.

STATE OF WASHINGTON, }
} ss.
COUNTY OF KING, }

Charles Jolivet, being sworn according to law, says that he is the agent of the defendant above named, in the City of Seattle, and in charge of his profits and business therein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

C. JOLIVET.

Subscribed and sworn to before me this 9th day of March, 1916.

(SEAL) JAMES KIEFER,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of within Answer received and service of same acknowledged this 9th day of March, 1916.

WM. H. GORHAM,
Attorney for Plaintiff.

(*Indorsed:*) Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 11, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Reply.

Comes now the plaintiff herein and for reply to defendant's answer herein, says and alleges:

I.

Replying to the first affirmative and separate defense of said answer he denies generally each and every allegation therein contained.

II.

Replying to the second affirmative defense of said an-

swer he denies specifically each and every allegation therein contained.

Wherefore plaintiff prays as in his complaint herein.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of with Reply received this 7th day of April, 1916.

JAMES KIEFER,
Attorney for Defendant.

(*Indorsed:*) Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 1, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties hereto that a jury is hereby waived at the trial of the above entitled cause.

Dated, Seattle, July 7th, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

JAMES KIEFER,
Attorney for Defendant.

(*Indorsed:*) Stip. to waive jury. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 8, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States, Western District of Washington, Northern Division.

J. R. Barnaby, Plaintiff,
vs.
Societe Nouvelle d'Armement, Defendant. } No. 3241

Memorandum of Decision, Filed August 21, 1916.

William H. Gorham, *For Plaintiff.*
James Kiefer, *For Defendant.*
Cushman, *District Judge.*

Plaintiff sues the defendant, a corporation of the Republic of France, maintaining a line of vessels plying between ports of Puget Sound and those of foreign countries, for services rendered as ship's agent between October, 1910, and June, 1912. The defenses are: The Statute of Limitations and that the present suit is barred by reason of a former judgment for the same cause, which has been paid. The cause was tried to the court on a written stipulation without a jury.

The employment of the plaintiff in the particular service for which suit is brought is evidenced by cablegrams and letters of the defendant. In these communications, while requesting the services of the plaintiff in the defendant's behalf, nothing is said concerning the amount to be paid plaintiff therefor. As pointed out, the last service sued for was rendered in June, 1912. Suit was begun in February, 1916.

The Statute of Limitations runs against a foreign corporation, while keeping a general agent in the district. The statute provides:

> "The period prescribed in the preceding section for the commencement of actions shall be as follows * * * Within six years * * * 2. An action upon a contract in writing, or liability express or implied arising out of a written agreement;" (Secs. 156 and 157, Rem. & Bal. Code.)

It is the defendant's contention that the letters and cablegrams of defendant containing no stipulation as to the

price to be paid plaintiff for his services, that the contract is not saved by the foregoing provision, but that the three years Statute of Limitations, concerning,

> "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

for which provision is made in section 159, Remington & Ballinger's Code, applies, and that the action is barred.

The court is asked to treat as dictum that part of the decision of the Supreme Court of the State of Washington, in *Ingalls vs. Angell* (76 Wash., 692), relied upon by the defendant as not necessary to the decision and at variance with the decision of the same court in *Caldwell vs. Hurley* (41 Washington, 296, at 301).

On account of the conclusion reached, it will not be necessary to determine whether the three or six years Statute applies.

It is averred in the complaint that, from October, 1910, to June, 1912, plaintiff rendered services in the state of Washington as the ship's agent for the defendant The evidence shows that Captain Jolivet, in June, 1913, became defendant's agent at Seattle, where plaintiff had formerly been employed in that capacity. The evidence tends to show defendant had no other agent in Washington than the plaintiff, prior to the appointment of Captain Jolivet The complaint further avers, speaking of defendant:

> "and during said three years last past has maintained and is now maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said state."

The Supreme Court of the state has held, in *Blalock vs. Condon* (51 Wash., 604 at 606), opinion by Judge Rudkin:

> "Pierce Code, Sec. 291 (Bal. Code, Sec. 4807) (Sec. 167, Rem. & Bal.), provides as follows:
>
> "The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any

county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed.

"This court has uniformly held that the last clause of this section applies to actions by private parties as well as to actions by the state or its municipal subdivisions, and that an action is not deemed commenced so as to toll the statute of limitations until the complaint is filed, though it may be deemed commenced for other purposes by the service of summons and complaint. *Cresswell vs. Spokane County*, 30 Wash., 620; 71 Pac. 195; *Bay View Brewing Co. vs. Grubb*, 31 Wash., 34, 71 Pac. 553; *Service vs. McMahon*, 42 Wash., 452, 85 Pac. 33."

The statute further provides:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint." (Sec. 220, Rem. & Bal. Code.)

The foregoing admission in the complaint in the light of the evidence amounts to this: That it was plaintiff's claim that his own agency and that of Jolivet together extend back for more than three years prior to the filing of the complaint. Unless plaintiff could institute suit by service on himself, as agent of the defendant, there was no way for him to commence an action against the foreign defendant to obtain a personal judgment prior to the appointment of Jolivet as its agent.

The defendant's contention, insofar as the Statute of Limitations is concerned—that the provisions of the last quoted statute do not apply—does not commend itself to the court, because there is neither an exception to that effect in the statute, nor is any reason advanced for making such

an exception. In fact, reason would seem to indicate a contrary course. To file a complaint in a public office would tend to induce the foreign corporation sued not to appoint an agent upon whom service could be made.

> "Where service is made upon an officer or agent who, although within the terms of the statute, sustains such a relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorized. So service will not be sustained where it is upon a person who is party plaintiff, or plaintiff's attorney in fact, or who is plaintiff's assignor." (32 Cyc., 554.)

The statute further provides:

> "If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action." (Sec. 168, Rem. & Bal. Code.)

The Statute of Limitations did not begin to run until the appointment of Jolivet, as defendant's agent, in July, 1913. Such appointment affects the return of defendant to the state, so far as plaintiff's right of action was concerned. The action being commenced in February, 1916, it was begun within three years.

The remaining affirmative defense is that of *res adjudicata* and, in particular, that phase of the doctrine of *res adjudicata* concerned with the splitting of causes of action.

In October, 1914, plaintiff brought suit against the defendant in the Superior Court of the State of Washington for services as ship's broker, such services alleged to have been rendered between November 12, 1909, and January 5, 1912, at Seattle, Washington, and Vancouver, British Columbia. This suit was begun by process of garnishment

against certain amounts claimed to be owing the defendant by Balfour-Guthrie & Co., amounting to about $1,000. The complaint in that suit averred the services to be worth $1,000.

After suit was begun, the defendant appeared generally contesting the cause upon the merits, admitting the performance of the services, but denying the value as averred and pleading payment. Upon this issue, the cause was tried. Plaintiff recovered judgment against the garnishee as prayed, for $1,000.

From the evidence in the present cause it is clear that plaintiff not only rendered services for the defendant during the time in question in connection with three certain law suits brought in Vancouver, British Columbia, but other services in addition, mainly in connection with proceedings for the adjustment of general average losses.

The evidence further shows that separate letters of employment covered the latter services; that separate statements of account were rendered on account of this latter service to the defendant. In rendering statements of account to the defendant, the latter services were always separately stated. The plaintiff made a separate effort to collect on account of his services in the general average proceedings through the adjuster.

The evidence does not clearly disclose the exact distinction in the services rendered by the ship's broker, for which the first suit was brought, and a ship's agent for which the present suit is brought. No case has been called to the court's attention directly upon the point of whether a suit begun by process of attachment or garnishment is *res adjudicata* of a subsequent suit in *personam,* barring the assertion in the latter suit of other similar items of services on account, due at the time the first suit was brought.

Sight is not lost of the fact that if the claim upon which the action is based is defeated in the proceeding in *rem,* the judgment would be *res adjudicata* of the same claim asserted later in *personam.* It is true that the writ of attachment or garnishment serves a double purpose:

It is not only a proceeding against the property, but the seizure, itself, serves to bring the defendant into court; but whether it will serve the latter purpose is, at the beginning, problematical. Therefore, a cause so begun is, until the general appearance of the defendant, one entirely in *rem*. If the defendant does not appear, the judgment is limited to the property attached, or garnisheed. There can be no personal judgment for the excess. The doctrine of *res adjudicata* proceeding upon the principle of estoppel, the estoppel must be mutual. Therefore, if at the beginning it would not do the plaintiff any good to assert any claim in excess of the amount attached or garnisheed, there would be no way to enforce the judgment in excess of such value—the reason for the doctrine of *res adjudicata* ceases to apply.

In beginning suit by such garnishment upon his entire claim, the plaintiff would be faced with the following uncertainties:

Defendant might not appear;

If it did not, any judgment in excess of the amount garnisheed would be idle;

If the defendant did appear, it might appear specially and attack the regularity of the garnishment;

If this attack proved unsuccessful, the defendant might abide the result, in which case any judgment in excess of the amount garnisheed woud be of no benefit to the plaintiff.

If the plaintiff could not calculate upon benefit or advantage upon suing upon his entire claim, there would appear no reason for requiring him to undertake the labor and expense necessary to establish his entire claim. If the defendant appeared, generally, the plaintiff could ask to amend and set up his entire claim, but he might not consider himself in a position to assert it with safety. If he felt that he was in such a position, the defendant might plausibly object for the same reason.

In matters of amendment, the discretion of the court is well nigh arbitrary. The rule of *res adjudicata* should

not be left the sport of such a discretion. The reason for the rule in a suit in *personam* against splitting causes of action, in part, doubtless, is that the plaintiff should not be allowed, without benefit to himself, to injure the public by wasting the court's time and injure the defendant by putting him to excessive costs, needlessly. But in a suit begun in *rem* where the plaintiff may be wasting his efforts and means in asserting his entire claim, a reason for an exception to the rule appears.

The allegations of the complaint in the former actions were meager concerning the cause of action. There was nothing therein specifying the items of service for which suit was brought, the allegations simply being that, during a certain time, at certain places, "plaintiff rendered services as ship's broker to the defendant, at his special instance and request." No bill of particulars was required or given. It is, therefore, proper to look into the proceedings, aside from the pleadings, in order to determine exactly what was litigated.

It appears that the evidence given on plaintiff's behalf was confined to his services in connection with the general average proceeding and that judgment was given him therefor. The question was, therefore, in issue whether the services performed by plaintiff were those of a ship's broker, of which the judgment was conclusive.

There being no evidence as to whether the services for which plaintiff now seeks to recover were those of a broker, rather than a ship's agent, the precise point is not then in issue as to whether such services were those of a ship's broker or not. The term "ship's agent" is broader than "ship's broker." The latter might be included in the former, but not the former in the latter. The services for which claim is now made being those of an agent, and there being no evidence that they are those of a broker, the burden of establishing such fact, resting upon the defendant, has not been upheld.

Owing to these uncertainties, it is manifest that the more reasonable course to pursue is to hold that only those precise questions were determined in the former suit to which the court's attention was directed by the evidence

and arguments in the cause, and which were, upon such evidence and the pleadings actually considered, or absolutely necessary to its judgment, and not to hold the judgment conclusive of all matters that might have been put in issue by the pleadings.

23 Cyc., 1297; 1311, note 6;

Cromwell vs. County of Sac, 94 U. S., 351, 354.

Four witnesses for plaintiff, basing their opinions upon plaintiff's statement of the nature of his services, have testified that such services were worth from $5,000 to $7,000. Two witnesses for the defendant testified that they were only worth $500 or $600. Plaintiff testified that one year and eight months were covered by the services rendered and that the time actually occupied, if boiled down, would amount to one year, of eight hours a day; that, in 1909 he earned, in his business, $3,000 or $4,000.

Making due allowance for the interest of the plaintiff in testifying concerning the nature and extent of his services, upon which the experts based their opinions as to value, and also taking into account the success achieved by the plaintiff, I conclude that he is entitled to $4,000, and the judgment will so provide.

(*Indorsed*:) Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 21, 1916. Frank L. Crosby, Clerk. By F. L. C., Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. Barnaby, Plaintiff,
vs.
Societe Nouvelle d'Armament, Defendant. } No. 3241

General Finding.

The court, in the above entitled cause, finds for the plaintiff in the sum of four thousand dollars, together with interest thereon at the rate of six per cent. per annum from the 6th day of June, 1912, until the 2d day of October,

1916, amounting to the sum of one thousand thirty-three and 33-100 dollars, in all the sum of five thousand thirty-three and 33-100 dollars. Defendant excepted to all the foregoing findings and its exception allowed.

EDWARD E. CUSHMAN,
Judge.

(*Indorsed:*) General Finding. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMAMENT, a Corporation, Defendant. } No. 3241

Judgment.

This cause having come on regularly for trial to the court upon the issues of fact raised by the pleadings, a stipulation in writing by the parties having been theretofore filed in said cause waiving a jury, the plaintiff appearing by William H. Gorham, Esq., his attorney, and the defendant appearing by James Kiefer, Esq., its attorney, and the trial thereof having proceeded with the introduction of evidence on behalf of the respective parties, and the parties having rested, and the court having heard argument of counsel, thereupon the court, after duly considering the evidence and the law applicable thereto, and being fully advised in the premises, having filed its memorandum opinion on the merits in said cause; and the parties having joined in a request for special findings and neither party having served his draft findings or delivered the same to the clerk of the court for the Judge presiding at said trial, and the time within which the defendant as the losing party has under the Rules of this Court to serve its draft findings and deliver the same to the clerk for the Judge presiding at said trial having expired and the plaintiff having in open court waived his right to special

findings, and the court having found the issue for the plaintiff in the sum of four thousand dollars, together with interest thereon at the rate of six per cent. per annum from the 6th day of June, 1912, until the 2d day of October, 1916, amounting to the sum of $1,033.33.

Now, therefore, upon motion of the plaintiff, the court being fully advised in the premises,

It is considered, ordered and adjudged, that J. R. Barnaby, the above named plaintiff, do have and recover of and from the Societe Nouvelle d'Armament, a corporation, the above named defendant, the sum of four thousand dollars, together with interest thereon at the rate of six per cent. per annum from the 6th day of June, 1912, until the 2d day of October, 1916, amounting to the sum of $1,033.33, in all the sum of five thousand thirty-three and 33-100 dollars, and his costs and disbursements herein taxed at the sum of ———————— dollars.

Done this 2d day of October, 1916.

EDWARD E. CUSHMAN,
Judge.

(*Indorsed:*) Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMAMENT, Defendant. } No. 3241

Petition for New Trial.

To the Honorable E. E. Cushman, Judge of the above entitled court:

Comes now the defendant and petitions the court to set aside the judgment and decision herein and grant a new trial of this cause, for the following reasons and upon the following grounds:

I.

The amount allowed the plaintiff by the decision of the court herein is excessive and not justified by the evidence in the cause.

II.

That the evidence is insufficient to justify the finding of the court in favor of the plaintiff in this: that the evidence given at the trial established that the plaintiff's demand is and was at the time of bringing this action barred by the Statute of Limitations of the state of Washington, the action having been begun more than three years after the rendition of the last services sued for.

III.

That the evidence taken at the trial is insufficient to justify or support the decision of the court herein, in this: that the plaintiff on the 22nd day of October, 1914, commenced an action in the Superior Court of King County, Washington, wherein he was plaintiff and the defendant herein was defendant, being Number 104307, for services as a ship broker rendered between November 12th, 1909. and January 5th, 1914, to this defendant, and recovered a judgment therein on May 18th, 1915, against this defendant, which judgment has been fully paid and satisfied, and which judgment bars any recovery herein, it having been stipulated in open court that the words "Ship's Agent" as used in the complaint herein upon amendment should be deemed and taken to mean the same thing as "ship broker," in the complaint in the cause in the Superior Court, and said amendment should not prejudice defendant's plea of former recovery.

IV.

For error of law occurring in the trial, in this: that the court sustained an objection to the following question: (Q.)"Now, 1911, what were the receipts of your office?" propounded to the plaintiff upon cross examination.

V.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the testi-

mony of the witness, William H. Gorham, a witness on behalf of the plaintiff.

VI.

For error of law occurring in the trial, in this: that the court overruled the objections of the defendant to the following question propounded to the plaintiff: (Q.) "I will ask you if this bill was the basis of your complaint and recovery in the suit in the Superior Court?"

VII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff: (Q.) "I will ask you if at the trial you testified in support of compensation for any services other than that involved in the general agency?"

VIII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff: (Q.) "Did you, or did you not, testify in that case relative to receiving or not receiving instructions to render general average agency services?"

IX.

For error of law occurring in the trial, in this: that the court overruled the defendant's objection to the following question propounded to the plaintiff, a witness on his own behalf (Q.) "I will ask you whether, on the strength of that letter, you rendered a general average agency service?"

X.

For error of law occurring in the trial, in this: that the court overruled the objections of the defendant to the following question propounded to the plaintiff, a witness on his own behalf: (Q.) "And from whom had you expected to receive a check for payment of the bill?"

XI.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the fol-

lowing question propounded to the plaintiff, a witness on his own behalf: (Q.) "Were the acts whereby you discharged your function as a general average agent, the same acts whereby you discharged your function as a ship's agent in the matters you testified to this morning?"

XII.

For error of law occurring in the trial, in this; that the court overruled the objection of the defendant to the following question propounded to the plaintiff, a witness in his own behalf: (Q.) "When you brought the first suit, did you know that the defendant had an agent in Seattle upon whom service of process could be had?"

XIII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff, a witness in his own behalf. (Q.) "Do you remember your counsel advising you as to the matter of the necessity of the court acquiring jurisdiction by service upon defendant?"

XIV.

For error of the law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff, a witness in his own behalf: (Q.) "Did you state to your counsel at that time, that this corporation had an agent in Seattle upon whom service of process could be had?"

XV.

For error of law occurring at the trial, in this: that the court overruled the objection of the defendant to the introduction of evidence on behalf of plaintiff, upon the ground that the action appeared to be barred by the Statute of Limitations upon the face of the plaintiff's complaint, and in this: that the court permitted plaintiff to give evidence in support of his complaint over the objection and exception of defendant.

This petition is made upon the minutes of the court,

and the pleadings and files in the case, and the exhibits offered upon the trial.

Respectfully submitted,

JAMES KIEFER,
Attorney for Defendant.

(*Indorsed*:) Petition for New Trial. Filed in the U. S. District ourt, Western Dist. of Washington, Northern Division, Oct. 9, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMAMENT, Defendant. } No. 3241

Order Denying Petition for New Trial.

In this cause the petition of the defendant for a new trial having been served and filed and submitted to the court for consideration.

It is by the court ordered and considered upon due consideration that said petition for a new trial be and the same is hereby denied, to which order the defendant excepts and its exception is allowed.

Done in open court October 16, 1916.

EDWARD E. CUSHMAN,
Judge.

O. K.—William H. Gorham.

(*Indorsed*:) Order Denying Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 16, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. Barnaby, Plaintiff,
vs.
Societe Nouvelle d'Armament, Defendant. } No. 3241

Petition for Order Allowing Writ of Error.

The said defendant, Societe Nouvelle d'Armement, a corporation, feeling itself aggrieved by the judgment entered in said cause on the 2nd day of October, 1916, in favor of said plaintiff and against said defendant for the sum of five thousand thirty-three dollars and thirty-three cents ($5033.33), and said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit. And further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 7th day of December, A. D. 1916.

James Kiefer,
Attorney for Defendant.

Copy of within Petition for Order Allowing Writ of Error received, and due service of same acknowledged this 7th day of December, A. D. 1916.

William H. Gorham,
Attorney for Plaintiff.

(*Indorsed*:) Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the court-room of said court in the City of Seattle, Washington, upon the petition of the defendant, Societe Nouvelle d'Armement, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant, Societe Nouvelle d'Armement, a corporation, of a bond according to law, in the sum of six thousand ($6,000.00) dollars, the same shall operate as a supersedas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this 7th day of December, A. D. 1916.

JEREMIAH NETERER,
Judge.

Copy of foregoing order received and service of same acknowledged this 7th day of December, A. D. 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

(*Indorsed*:) Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMAMENT, Defendant. } No. 3241

Bill of Exceptions.

Be it remembered that on this 14th day of July, 1916, this cause came on to be heard before the Honorable E. E. Cushman, one of the judges of the above entitled court, a jury having been waived by stipulation in writing, signed by counsel for the parties and filed in this cause, whereupon the following proceedings were had:

Mr. Gorham, counsel for plaintiff, moved to amend the complaint in the fourth paragraph, by erasing the words "Ship's broker," and inserting in lieu thereof "Ship's agent." The amendment was objected to by counsel for defendant, whereupon it was stipulated by counsel for plaintiff in open court, that the services sued for in the action referred to and set up in defendant's answer were rendered as a ship's agent, and that for the purpose of defendant's plea of former recovery the term ship's broker used in the complaint in the Superior Court and termed ship's agent in this cause, after amendment should be held to mean the same thing, and should not prejudice the defendant's plea of former recovery, and that such plea of former recovery or *res judicata* should have the same effect as though there had been no amendment, and thereupon the amendment was allowed. Counsel for plaintiff thereupon made an opening statement to the court embodying among other things the statement that plaintiff relied upon certain letters as evidencing the contract of employment, but containing no direct promise of compensation for the services and mentioning no sum agreed to be paid plaintiff, and that evidence would be offered of the reasonable value of the ser-

vices alleged to have been rendered by plaintiff. Thereupon counsel for defendant objected to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action is barred by the Statute of Limitations of the state of Washington, and that it is apparent on the face of the complaint. After discussion and argument the court declined to rule, reserving the question for consideration on the final argument, and thereupon it was agreed between counsel in open court that all of the plaintiff's evidence should go in subject to this objection, and that the defendant should not waive it by offering testimony in its own behalf, and thereupon,

Mr. Barnaby, being called as a witness on his own behalf, and being sworn, testified as follows: That his full name was Joseph Robert Barnaby; that he is the plaintiff; a resident of the state of Washington, and a citizen of the United States; a ship's broker and agent by occupation and had been for upwards of thirty years, in Liverpool, England, and in Seattle, and thereupon it was admitted on defendant's behalf that Mr. Barnaby was qualified in his business. The witness further testified: I have known the defendant since 1907; that the defendant had a ship here in 1907 and that was how I became connected with them; the ship had difficulty in regard to collection of freight, and her captain on behalf of defendant requisitioned my services; that they were apparently pleased with the way I handled the matter for them. It was in 1907 at the time of the financial panic, and defendant asked me if I would be prepared to represent them as agent in the Pacific Northwest, or in Seattle; defendant asked me for references, which I gave, and defendant looked up my record, were apparently satisfied with it, and gave me the agency of their ships here in the Pacific Northwest. I received communication from defendant with reference to its ship Notre Dame d'Arvor, and I produce cablegram of August 5, 1910, from Nantes, France, to Barnaby, Seattle: "Notre Dame d'Arvor, proceed to Victoria Vancouver can you recommend us an agent in." Notre Dame d'Arvor was a French steel bark, class 100 A1, owned by the defendant; to that I replied by cable, "August 6, 1910, Nove, Nantes, Notre Dame d'Arvor leave the business in my hands, shall

I arrange towage from Astoria, Barnaby." I received cable August 9, 1910, from Nantes, France, to Barnaby, Seattle, "Notre Dame d'Arvor, we leave the business in your hands cabled pilots Astoria order the ———— to Victoria please have there orders waiting outside to avoid expense and delay." Cablegrams offered in evidence as plaintiff's exhibit "1," "2" and "3"; I had a communication from defendant with reference to the litigation referred to in the complaint herein. Witness produces a cable from himself to defendant, dated Seattle, October 24, 1910, "Notre Dame d'Arvor, Retaining an absolute lien on the cargo, until freight is paid. Receivers claim consequence, cargo partially damaged and the balance discharged wharf unauthorized by them damaged $18,500.00 Ship is arrested Vancouver. Please provide bail immediately Vancouver Ship now ready to proceed to loading port. Grain charterers threaten action in consequence of unexpected delay." The defendant replied to me by cable four days later, and I received a cable from the defendant dated October 25, 1910, addressed to me, "Arvor we consider action illegal we will communicate with London we will telegraph you again." I received cablegram from defendant of October 27th, 1910, addressed to me, "October 27, 1910, Arvor have given bail for $18,500.00. Canadian Bank of Commerce consignees action illegal employ a competent lawyer claim indemnity." Signed "Nove," which is the defendant's telegraphic address, and the cablegram refers to the ship Notre Dame d'Arvor; witness produces cablegram from himself to defendant dated Seattle, October 28, 1910, "We have commenced action indemnity release before giving bail we are in communication with Balfours day by day Understand Balfours cabling you We advise do not make concession in loading days;" also produces telegram from defendant to witness of October 29, 1910, "Have given bail for $18,500.00 in favor of Balfours Vancouver What is the reason Arvor not proceeding to Seattle We have not received communication Balfours' Will not make any arrangements Act accordingly with all possible vigor and dispatch."

"THE COURT: All these addressed to you here in Seattle?

A. Yes, Your Honor, all in Seattle."

The witness identified certain letters shown him and says they were received in the ordinary course of business and mail from defendant with due reference to the dates of the letters, and from the first letter dated October 29, 1910, addressed to witness subject Notre Dame d'Arvor, reads: "We confirm our letter of date as well as cable exchanged," and from last paragraph, "We have asked you to instruct the lawyer to act with all possible vigor and dispatch, as we are not going to make any concessions to the Messrs. Balfour. We are decided to fight the case out." Letter signed by "Poulet, director;" and produced and identified another letter of the same date addressed to Barnaby, subject Notre Dame d'Arvor, "We confirm cable exchanged, and feel much annoyed about all the trouble regarding the same," and three or four paragraphs down, "We have now given bail for the above mentioned amount by the Canadian Bank of Commerce, Vancouver. We expect that this will enable the vessel to proceed immediately to Seattle to load the wheat." At the end of second page, "Of course the captain has been in Victoria and Vancouver, and you are in Seattle, consequently it has not been easy for you to act in conjunction with him, but we think that your representative in those two ports ought to have kept us better advised about the ship's position. We trust you will succeed with the lawyer's assistance in getting the ship out of this mess and that you will if necessary take up legal proceedings in order to collect the freight and the demurrage due up to the date on which the vessel will be released, and be refunded of all the expenses incurred by the action. Please insist particularly on the bail being withdrawn as soon as possible." Signed "Poulet, Director." Various cablegrams and letters just referred to offered in evidence and admitted as plaintiff's exhibits "4," "5," "6," "7," "8," "9," "10," "11" and "12." With reference to the ship's formal agency in response to the instructions to act as agent particularly with reference to item in bill of particulars which refers to the Ship's agency as distinguished from litiagtion over the wheat charter party, the witness further testified: I instructed my agent at Victoria to give orders to the vessel before she entered the Columbia River to proceed to Royal Roads, Vancouver Island. The ship was bound originally to Portland, Oregon. The owners cabled

me saying they had arranged to deviate the voyage to Vancouver Island for orders, and asked me to see that the ship had orders given her while she was at sea so as to save expenses and delay in entering the Columbia River. I did that. The captain duly received my orders and proceeded to Royal Roads, Vancouver Island. In the ordinary course as ship's agent I interviewed the owners of the cargo and secured their evidence of title to the cargo; gave all necessary instructions in the usual way and that is about all there is to the ordinary agency of a vessel. According to terms of charter party the receivers of the cargo were to enter and clear the vessel at Victoria. As a matter of fact they failed to do so and I secured for the owners a refund of those fees. Greer, Coyle & Company, Victoria and Vancouver, B. C., acting for me, they being my agents, entered the ship. Subsequently there was a change of masters of the vessel before she entered upon her homeward voyage. I cabled to the owners recommending that the captain be retained in Vancouver as a witness; they agreed, and instructed me to appoint the first officer to take command of the ship, which I did and gave him written and other instructions which the Societe approved of, which the Societe wrote to me saying they "entirely approved of the instructions given by you to the new captain." The new captain signed bills of lading for the homeward cargo, but he was a young Frenchman, inexperienced, had never had command of a vessel before. I took him to the charterer's office and examined the documents, and told him to sign them. He signed them on my directions which was confirmed in my letter to the Societe and of which they approved. I alone passed upon the documents being in order. The captain took my orders. My agent at Vancouver cleared the vessel there. The charterers in Tacoma cleared her out of her wheat loading port under my directions. I accompanied the captain and saw him all through because he was a new man. The vessel sailed from Tacoma sometime in November, 1910, I think. Witness produces cablegram of September 10, 1910.

"THE COURT: They are a part of this second item; exhibits 4 to 12 concern this lawsuit. These you are bringing in, are they a part of that same transaction?

MR. GORHAM: No, these cables are with reference to the matter of the homeward wheat charter party, the first item in the bill of particulars.

Q. (The Court). They relate to items covered by exhibits 1, 2 and 3?

MR. GORHAM: Exhibits 1, 2 and 3, if the court please, regard ship's agency. This is in addition."

THE WITNESS: Cable from the Societe dated Nantes, September 10, 1910, to Barnaby, Seattle, "What is the present price of ballast Vancouver? What is the best freight you can offer?" I replied to that. Cablegram from the Societe, dated Nantes, September 13, 1910, to Barnaby, Seattle, "Arvor is chartered to Puget. Wheat to U. K." It is not expressed but it means that. "Arvor is chartered from to Puget wheat 27 shillings and six pence for 2240 pounds gross per ton of five hundred stiffening in Vancouver paying $2.00 fifteen lay days the charterers are Balfours." Cablegrams just read by witness admitted in evidence and marked plaintiffs exhibits "13" and "14." Defendant consenting that bill of particulars be amended to include the exhibits. With reference to the homeward wheat charter, I interviewed Balfour, Guthrie & Company and made tentative arrangements for the loading of this wheat cargo, for the furnishing of the 500 tons of wheat stiffening. I advised the captain and I advised my agents in Vancouver and Victoria. I arranged for prices for lining the ship and furnished those to the captain as a guide to him because his ship was in Vancouver and she would have to be lined up in Vancouver by Canadian liners. I made all efforts to dispatch the ship from Vancouver so as to comply with the terms of the charter party of which I did not have a copy at the time, but Balfour, Guthrie & Company told me that they wanted it quickly to load as they had the wheat there in the warehouse and didn't want to have to pay storage. There was considerable delay with regard to the vessel getting ready for this wheat cargo. Then the captain, who could speak very little English, he was a Frenchman, a young naval officer, excitable, he said, "Five hundred tons of stiffening is not enough for my ship. I must have six hundred and fifty; you must get me six hundred and fifty tons of wheat stiffen-

ing." I said, "Well, your owners say five hundred tons." He said, "O well, they don't know anything about it. I must have six hundred and fifty." I said, "All right, Captain, I will try to arrange it for you." I interviewed Balfour & Company and endeavored to arrange this. They said they would consider it. Meantime I advised the owners of the captain's desire. Balfour, Guthrie & Company intimated afterwards they would supply this additional quantity. I said you had better give me that in writing, and we agreed on the price which was the same price as that for the five hundred. I informed the captain accordingly and informed the owners, that is, the Societe. The Societe meantime disagreed with the captain's desire for an additional quantity. I ordered wheat stiffening up from Seattle. It had to go up from Seattle. There was no wheat shipped from Vancouver at the time on sailing vessels. It had to go up from Seattle, six hundred and fifty tons instead of five hundred. When the six hundred and fifty tons got alongside, the captain said, "I will take five hundred tons, I don't want any more." "Yes, Captain, but your agent has arranged for six hundred and fifty tons." "I don't want it: take it away." The charterers, Balfour, Guthrie & Company had this additional stiffening thrown back on their hands. The Societe had rapped the captain over the knuckles for asking for additional wheat stiffening. The wheat was rejected and sold for account of whom it may concern by Balfour, Guthrie & Company, that is the excess. I mollified Balfour, Guthrie & Company to such an extent as to induce them afterwards to relieve the ship and the owners and myself of all liability for the additional expense to which they were put. All this took place exclusively in Seattle. My dealings with Balfour, Guthrie & Company were in Seattle; with the Societe by cable from Seattle; my communications with the captain were by letter from Seattle, and partly oral, he came down to see me. I did not visit Victoria during this time: it was done in Vancouver. I kept a diary of the transactions of this ship which I have; the entries in that diary were made on the dates of the several events.

Mr. Gorham: You may refer to the diary, Mr. Bar-

naby, for such further matters—refresh your mind as to the facts with reference to the wheat charter party if there are any.

Witness Continued: The ship should have been down in Tacoma to load her wheat cargo; she was delayed on account of the lackadaisical manner in which the Societe fulfilled their obligations to the court in Vancouver; the wheat charterers here in Seattle, Balfour, Guthrie & Company, notified me in regard to the matter. Witness produced letter from Balfour, Guthrie & Company, dated September 14, 1910, addressed to J. R. Barnaby, Seattle; letter offered and admitted in evidence and marked plaintiff's exhibit "15," and read. The ship was delayed and the charterers threatened action for non-fulfilment of the terms of the wheat charter, and I deemed it necessary, owing to the actions of the captain, the lackadaisical manner in which he was attending to the owners' interest, I deemed it necessary to station a special representative on board to hurry that ship on the way down to Tacoma to get her cargo, directly the bail from France enabled her to leave Vancouver. On the same day that the bail arrived in Vancouver, I had that ship clear, the tug arranged for—everything else—put a hustle on and had her brought down to Puget Sound. I told my man to be sure she swung into Port Townsend up past quarantine. Because other vessels had previously come right down to Seattle from Vancouver and had been ordered back to Port Townsend, and I didn't want to have that delay with my ship, and she didn't have it. The time was so vital, because the circumstances were so strained between the Societe or the captain and the wheat charterers. Therefore she got down to Tacoma in short order. The wheat charterers were also consignees of the outward cement cargo discharged at Vancouver. My representative in Tacoma stayed by the ship, went ashore, made all arrangements to get her alongside the berth, and start loading. Through his efforts and the good will which we had with Balfour, Guthrie & Company at that time, we got that ship loaded in record time. Within two days that ship was loaded fully with the cargo of wheat, three thousand tons. The time of her lay days under the charter party, that is the time which the char-

terers had to load her was fifteen days. I saved the Societe the thirteen days in loading that vessel; the value of that time even at the low rate stipulated in the charter party, three pence per registered ton, amounts to $1759.00. I put a general hustle on, and got the ship through the customs and the French consulate, and introduced the captain, and personally attended to it, so as to get through and go on; took him up to the charterers' office, had the documents signed, put all the documents in order, and had him ready to get to sea. The vessel was in possession of the marshal of the British Columbia courts at Vancouver after she was fully discharged, and after some of the stiffening had been put in. There was a delay at Vancouver of approximately two weeks when she was ready with the stiffening to proceed to Tacoma. During that period I was partly in Vancouver, and partly in Seattle getting a move on, and when I wasn't in Vancouver my representative was. I had occasion to send to Balfour, Guthrie & Company's office probably a dozen times at any rate during that period. After the vessel was loaded and ready to clear with her wheat cargo, I was requested by the owners to secure advances on freight on the wheat charter party. The original captain was so neglectful of his services that he failed to have sufficient money here to defray the ship's port expenses. I told him to have sufficient money here on Puget Sound to have no hitch, he says, "That is alright; that is alright," but when it came time for the ship to proceed to sea there was not enough money to cover her port expenses. The bills of lading were signed; there was nothing else to do but cable the owners to remit a sufficient sum to cover those. They cabled me to take a freight advance, to obtain cash on the wheat bills of lading. I went to Balfour, Guthrie & Company; they said, "No, we have had so much trouble with that captain; we will do it for you, but not for that captain; we won't have any more bother with it." The charter party was made in London; they did not advance freight; I cabled to the owners, "too late to get freight advance as bills of lading signed five days ago. Please remit immediately twenty-five hundred dollars to cover balance ship's disbursements. Ship waiting." I wanted to get the ship away to sea; it would cost money to keep the ship in port.

They replied, "Twenty-five hundred will be sent to you by Henry, San Francisco." That money came to hand in due course and the ship's port expenses were defrayed and she went to sea. When the owners received my letter showing what quantity of wheat the ship had loaded, they wrote back to me saying they were disappointed in the quantity— this ship had only approximately three thousand tons —that on a previous voyage from Astoria she had loaded three thousand three hundred tons; they were losing the freight on three hundred tons they thought, and they wished me to investigate and report. I did so; I found out what quantity of wine she had on board, stores, coal, water, and added everything up in the way of cargo, examined the load line, knew what her draft was forward and aft, thought the thing over, consulted the old captain in regard to that; and eventually it developed that the ship's load line had been altered from the time she loaded the cargo in Australia some year or so previously, three thousand three hundred tons. There was a different load line then to what it was. That was the real explanation of why the ship loaded three hundred tons less on this occasion. I closed my investigation and informed the Societe. With reference to the litigation in British Columbia, the Societe had placed themselves in rather a bad position by not having made proper arrangements in regard to the damaged cargo which was coming out of the ship through a previous accident which had been in the courts in London, and when the libellants there were not the receivers. This cargo had been sold several times. When the Libellant had arrested the ship on October 21, 1910, I advised the Societe by cable to arrange for the bail to be put up; they instructed me to fight the case and act vigorously. (The Court) This is another fight? (Mr. Gorham) No, this is the same matter; we have the cablegrams in evidence. (The Witness) The libellants were Hind, Rolph & Company, of San Francisco, and Parrott & Company of San Francisco. Hind, Rolph & Company were the original charterers of the ship, although they parted with their rights subsequently; Parrott & Company had no documentary connection with the damaged cargo on the ship, but they presumably had some, because they and Hind, Rolph & Company jointly libeled the ship October 21, 1910, for

damaged cargo and improper delivery. As soon as I received the Societe's instructions I proceeded to Vancouver. I pretty well knew that I was up against big interests, the biggest interests on this Pacific Coast, Balfour, Guthrie & Company; Hind, Rolph & Company; Parrott & Company; R. V. Winch & Company, all millionaire firms. As far as my knowledge went, there was only one firm of maritime lawyers in British Columbia, the firm of Bodwell & Lawson. I found that the libellants had engaged them, so I did the next best thing, I went to a firm of highest repute in Vancouver, Russell, Russell & Hannington, and had a consultation with them. They arranged to take the case for me: they were to be responsible to me only; they were to take my instructions, Mr. J. A. Russell, the senior member of the firm said. It was necessary to furnish these gentlemen with advice to sustain our position in regard to charter parties and bills of lading and maritime custom and usage, for the reason that they had not had much experience along these lines and I arranged with them that I would get at the case, but they would look after the legal end of it. The lawyers on the other side deferred, protracted our case, and it ran along with interviews: we made up a counter-claim for lien charges. Our ship in the mean time, under my instructions, had, that is, prior to the arrest, our ship had placed a lien on the cargo for the recovery of freight, because the receivers of the cargo, the people who had title to the cargo, refused to pay the freight. They said "That cargo is damaged; we will not receive it; if you want your freight you must place a lien on the cargo." I endeavored to get them to alter their views but it was impossible, so a lien was placed on the cargo and the ship was arrested and hence that litigation in British Columbia. They blocked us all they could, we went ahead with our case; but we were the defendants, Your Honor, so we merely had to wait their time. They were plaintiff's. I furnished my attorneys with explanations of the various clauses in the bills of lading and charter parties, examined the survey reports, examined the circumstances of the two collisions in England, which really were the reason of the damaged cargo, so that we could contest and refute the plaintiff's allegation that our ship was responsible for the damaged cargo. I

made up the counterclaim with my attorneys' assistance; this ran our case along to December; I was in Vancouver all the time; I informed the Societe; I was in Vancouver all the time on this litigation and let my business in Seattle go; from October 29th well into the next year; I informed the Societe that it was necessary to concentrate all my attention; they asked me to give it my undivided attention; I informed them that I was in Vancouver and would stay there and force a conclusion if possible. Then along in December the libellants entered an action in another court for the recovery of the cement which we held under a lien for freight; we held that cargo under lien for freight. The libellants instituted another action for the recovery of that cement; instead of instituting the action in the Admiralty Court, they instituted it through the Supreme Court. There were some little difficulties there; I instructed my attorneys to defend that action; we got through with that favorably to the Societe; then in the same month, December, another of the consignees, R. V. Winch & Company, libeled the ship for wharfage, which they were clearly not entitled to in my opinion; I got together evidence on that point, had examination for discovery made. That case was postponed along in January, 1911, with the result that the libellant in that action withdrew his claim, and we, the Societe, won our point in that also. We were defendants in all these three actions. The result of the libel by Parrott & Company, and Hind, Rolph & Company, against the Societe was judgment in favor of the Societe, and we received judgment on the counterclaim also. As to the deviation, "The charter party was one agreement, the bill of lading another; the bill of lading being the last document signed, it is a custom in maritime law that that nullifies the operation of the charter party. That was one difficulty, or one advantage, one thing we had to consider. Then, on top of that, there was a deviation of the voyage, which brought about another agreement, and that caused some complication and a great deal of thought with regard to what our position would be in regard to this damaged cargo.

Q. Is this all affecting this litigation, you mean?

A. Yes. I went into that, and instructed counsel as

to my views. I advised them as to what the meaning of the cessor clause in the charter party was, where the charterers' liability shall cease on the shipment of cargo. These were all points which were necessary for the successful operation of our defense against the libellants. I cabled to the Societe for the deviation agreement. They had not furnished me with it, but simply told me that the voyage had been deviated. I got that in due course, furnished it to counsel. Then it developed, when we wanted to go to trial, it developed that the libellants for damaged cargo and improper delivery refused to admit that there had been a collision in the English Channel, or that the cargo was damaged as a result of that collision; and my attorneys advised me that it would be necessary to send a commission to England to get evidence on that point. Of course I could see that this was costing my clients, the Societe, a lot of money, all this delay; and I protested very strongly in an interview, to get that question waived. And I told my attorneys that they should try to get the attorneys for the libellants to agree to accept an authenticated copy of the London judgment as evidence of that collision in the English Channel. The attorneys for the libellants would not agree, but eventually did. But the Societe, instead of responding to my request for an authenticated copy of the London judgment, simply sent out a stenographer's copy, and thereby held us up several weeks more. It was their expense; it was their case; it was their laxity that we were further detained. So it became necessary to wire for a further authenticated copy. The libellant's attorneys accepted this as evidence of the collision, but they sustained their objection that the ship was still responsible for damaged cargo. I have had some experience in Liverpool, having studied naval architecture, and I found that the water, at the second collision, had not touched the cargo, but had trickled down the inside skin of the ship, had gone down into the well of the ship, that the floor was over three feet above the well of the ship, that this water had congregated, and we put in proof to show that the ship was not responsible for the damaged cargo. And, before the ship sailed from Puget Sound I ratified and fortified and reenforced our position in that respect by getting the members of the crew to appear

before a Notary in Seattle and state what were the facts. That also was put in evidence at the trial in Vancouver, B. C. and Victoria, B. C. The trial was further adjourned by the Judge having to go away to California. The attorneys later on seek to get an adjournment of the trial to August of that year. I stayed by it, Your Honor, and speeded up the case, and got our trial brought on before the Admiralty Judge in Victoria, on or about April 18th, 1911. About four days approximately was consumed in the trial, as far as I can remember; I was present, and was a witness; we expected to get through in two days but when the captain was put on the witness stand it was impossible to understand him; the Judge said the only thing to do was to adjourn the trial for another week or ten days and it would have to be heard in Vancouver; it was in Victoria then. The fact of the captain having been in a measure incompetent in those respects, threw a great burden on myself in sustaining the Societe's rights; in giving evidence and directing the case in all respects. The case therefore was adjourned to Vancouver for May 2nd, 1911, after the captain had been on the witness stand in Victoria. In Vancouver, the examination of the captain was resumed, I promoted and furnished my counsel to the best of my ability on these expert and technical matters; I appeared as a witness in support of our claim and the Admiralty Judge reserved judgment. Certified copy of the judgment of the court in the Parrott & Company and Hind, Rolph & Company's suit against the Notre Dame d'Arvor, referred to in the evidence of the witness on the stand, and also the report of the district registrar upon the reference provided for in the judgment offered in evidence.

Documents admitted in evidence and marked plaintiff's exhibits "16" and "17."

Counsel for plaintiff calls the court's attention to the following lines in the judgment, "I turn then to the question in dispute, the determination of which has been far from easy and has occupied much time. It is not necessary to refer to what happened in Victoria, where 6029 barrels of cement were discharged, other than to say that the actions of R. V. Winch & Company, Limited, and of Bal-

four, Guthrie & Company, from whom Winch & Company had bought the cargo, in regard to the bills of lading and general average bond were so unbusinesslike and irregular that Captain Pichard, master of the vessel, was fully justified in forming the opinion that he would have to be careful in dealing with them in future, and stand by his legal rights, which he had waived in a very accommodating manner in Victoria, relying upon the letters of Balfour, Guthrie & Company of the 1st and 6th of September and telegram of the 8th, which, in view of the evidence of Freer and testimony of Barnaby, must be given full effect to and cannot be explained away."

(The Witness): I wrote letters to Balfour, Guthrie & Company, the consignees and receivers, and got the captain to sign them, in accordance with the world custom. The essential letters were my letters in accordance with the world custom and the captain signed them. They were in reference to fixing the responsibility of Balfour, Guthrie & Company, in the first instance, that is, before the litigation took place; they were put in as exhibits. The judgment was given in this case in July, 1911; my attorneys in Vancouver advised me and I notified the Societe; they dropped me like a hot iron. After the rendition of the judgment by the court a reference to the registrar was made to assess damages; I rendered affidavits to my attorneys, furnished them with information to sustain the amounts of the claims and interviewed them on several occasions; speeded the matter in all manners possible in response to the instructions of the Societe.

Mr. Gorham: "And the registrars report in evidence if the court please, shows that the Societe owner of the vessel, recovered on its cross demand or counterclaim as follows:

> "Now, I do report that I have carefully examined the accounts, vouchers and proofs brought in by the defendant in support of her claim, and having read the two affidavits of Mathieu Picard sworn to on the 9th day of August, 1911, and the affidavit of Joseph R. Barnaby, sworn to on the 27th day of November, 1911, and having heard counsel on both sides, I find that there is due to the defendant the sum of $4,258.34, as stated in the schedule hereto annexed."

(The Witness). In addition to the $4,258.34 we recovered the whole freight due the ship, approximately about $7,000.00.

"THE COURT: That is the total amount, the counterclaim and all?

A. No; the total amount of freight. They paid us $5,000.00 in Victoria. The remainder they have not paid.

Q. Between the time you arrived in Vancouver and the time of the registrar's report, did they pay any freight?

A. They did.

Q. When, with reference to the institution of these suits?

A. While this litigation was pending, they found they were in error and came forward and made a tender of freight.

Q. How much, approximately?

A. $4,936.00.

Q. Was the freight accepted?

A. Eventually, yes.

Q. (The Court). You recovered the $7,000.00 in place of the $4,936.00 tendered.

A. Yes, Your Honor. All freight was finally recovered: and we recovered demurrage and damages.

THE COURT: Was the damage in the counterclaim?

A. Yes.

Q. (Mr. Kiefer). Was it part of the $4,200.00?

A. No, the demurrage amounted to about $1,600.00.

Q. (The Court). In addition to the $4,258.00?

A. Yes, Your Honor.

Q. (The Court). $1,600.00 more?

A. I beg your pardon, I think the $1,600.00 was included in that $4,258.00.

Q. Well, the registrar's report an allowance of $4,258.00. The first item is balance of freight.

A. Yes.

Q. The other items going to make up the total exclusive of $701.93, are for what is shown by the registrar's report?

A. As shown by the registrar's report.

Q. Other items are the captain's salary and expenses?

A. Yes. The captain's salary and expenses were recovered in addition to this $4,200.00. It was put in as costs, $2,500.00, and $701.00 freight. There was really an excess by reason of the libellants having failed—

Q. Take your diary, if you can, and from your diary tell the court what extent of time you were occupied in this litigation—you were personally occupied—in British Columbia.

A. Well, the whole period covered a year and eight months. But if it could be—that service was intermittent in that year and eight months—but if it could be concentrated and put boiled down into an ordinary working day of say eight or ten hours, it would occupy probably twelve months of time."

THE WITNESS: After the libel and arrest of the ship in October, 1910, I went to Vancouver and remained in Vancouver continuously until a couple of days before Christmas, and was continuously engaged from day to day in the direction of the litigation on behalf of my clients; it was absolutely necessary owing to the nature of the case, and the technical matters involved. I forwent all my other business so as to give this case my undivided attention according to the request of the Societe. I returned home Christmas, and went again to Vancouver early in January, about the 5th, and remained in British Columbia until about the end of February, and during all that time was reenforcing our case, going into the matter of the wharfage action, which had been continued over into January, getting the London authenticated judgment from the owners, and the deviation agreement. During that period from January 5th to the latter part of February my time was wholly and exclusively occupied in attending to the supervision of this litigation on behalf of my client, because we were expecting our case to come on; we reenforced and strengthened the case. I came back to Seattle in February and went back to British Columbia in March; remained for a few days; came back to Seattle, because the case had been adjourned; then our attorneys advised me it was necessary to meet them at Victoria, which I did about April 18th, 1911, for the purposes of the trial. Just about at that particular time I had buying orders for seven thousand steel drums, that is the business I am

engaged in; this trial was coming right on; my mind and attention were so concentrated on the success of the litigation of the Societe, that I set aside the steel drum contract, which was all but closed; on that contract my profit would have been $7,650.00; I had the buying and selling of that arranged; had the buying order; I lost that contract. At the time this litigation was in shape, it had been passed upon and the contract had been drawn between the parties. During all this period from October until April, I was in communication with the owners by cable and mail, and you will find in their letters they commended me right through. The correspondence was continuous; the volume of all the correspondence would run into hundreds of letters, or a thousand, or more. During this period from October to May, it was very voluminous and the Societe wrote, "Keep us well posted; we trust you will do your best to carry the case through;" that was all by letter.

Mr. Kiefer: I object to that, and move that it be stricken out.

The Court: Objection sustained.

We advertised the cargo for sale; wanted our freight; were entitled to it; and an action was brought to restrain us from doing so. The libellants said they were willing to give us a bond satisfactory so as to guarantee our freight; we said that is all we have been asking for. The writ was issued and the libellants paid all costs. The libel of Winch & Company against the vessel for salvage was dismissed upon libellants' motion, and the ship recovered its costs in that suit.

The Court: They paid the costs of all actions?

A. They did, sir.

In the replevin suit the court granted the application for the writ upon motion and the ship's representatives said that this bond to pay the freight was all they wanted, and the court imposed the costs upon the plaintiff in that case. The amount of the bond was $24,000.00 for freight and damages and detention. As agent for the ship under instructions as they have been introduced here from my principal, the Societe, the defendant in this case, I took the initiative and directed the defense in the litigation. It was done by me, my counsel assisting me. The receivers

of the cargo wanted to pay us only on 398 pounds per barrel under the bond they had given, only a short number and found they had agreed to pay duty in a large amount; of pounds per barrel. I went to the custom house and I said, "We are entitled to freight on the larger amount." And we got it. The difference of four pounds per barrel, a difference of 396 pounds per barrel and 400 pounds per barrel on 17,000 barrels of cement. I alone prepared the brief of facts for the solicitors and barristers on behalf of the shipowner, the French Societe, at Victoria. I jointly with my counsel consulted the witnesses and determined the materiality of their evidence and their knowledge of the facts; I directed the former master of the vessel who brought the vessel out from England; I determined upon his remaining and directed him to remain. I had full authority and discretion. I rendered a bill for my services in the matter of this litigation, ship agency, on the 31st day of March, 1913; I made a request for the payment of the bill as rendered; I have not been paid either directly or indirectly; I consider $5,000.00 the reasonable value of my services.

Cross Examination, by Mr. Kiefer.

The amount of the bill was $10,000.00; I changed my mind as to the amount we should claim in court here. In March, 1913, I did not think my services were worth twice what I now think they were; I still think they were worth $10,000.00; I thought I would be more modest; on consultation with my counsel I decided I would be modest about it—you used the right word—and I would ask for a reasonable sum and I placed that at $5,000.00.

THE COURT: When was the suit brought?

MR. KIEFER:.. *In February of this year.*

THE WITNESS: I would rather be modest about it.

Witness shown bill and says, "that is my bill." I claim that I rendered services as set forth in our complaint, from October, 1910, to the 6th of June, 1912, one year and eight months. The circumstances related in the bill are covered by the period which we claim for; this thing might have been a great deal fresher in my mind when I made out my bill in 1913, than it is now.

Q. And at that time you considered that your services ended in the month of April, 1912?

A. Well, it may have been a typographical error, I stated the services.

Q. But you say you never rendered any services after the month of June, 1912?

A. We are not suing for any after June, 1912. For the purposes of this suit, my services closed up in June, 1912. Have been in business in this city in ship's agency and brokerage upwards of ten years. I rendered only services as ship's agent to the Societe in the year 1910, to no other shipowner that year; I rendered no ship brokerage services to any other than the Societe in 1910, likewise in 1909. In 1909 the total net income of my office from all sources for the year 1909 was probably three thousand or four thousand dollars after paying operating and office expenses. The total net income of my office for the year 1910 excluding the services to the Societe was three or four thousand dollars. "Now in 1911, what were the receipts of your office?

MR. GORHAM: We object.

THE COURT: Objection sustained.

MR. KIEFER: That is the year in which your principal services is claimed to have been.

THE COURT: Objection sustained because according to his testimony so much of his time was taken that he was not paid for that it cannot be any guide.

WITNESS: My business relations were unsatisfactory and broken by this matter coming along.

MR. GORHAM: You mean your business relations with other firms?

A. Yes, here in one instance I lost a profit of $600.00 or $700.00."

THE WITNESS: I told you I got a lot of dispatch in the loading of this vessel with the outward bound cargo of wheat. I didn't pay the stevedores anything for this expedition, they got their ordinary rates for whatever overtime they occupied, paid them the ordinary going wages for their work: had to pay overtime for night work, but nothing beyond the customary charges.

(Recess until 2 p. m.)

At 2 p. m., J. R. Barnaby recalled. Redirect examination by Mr. Gorham:

Witness shown letter from defendant to himself, dated February 10, 1911; I have seen it before and received it on the 24th of February, 1911, in the due course of mail.

(Letter offered in evidence and admitted as Plaintiff's "Exhibit 18.")

Witness read paragraph as follows: Notre Dame d'Arvor. From document we have received from you, we recognize that you have well prepared the case for the lawyers, and even if they are not acquainted with maritime affairs, they will no doubt grasp the full situation." Witness shown letter dated March 25, 1911, from defendant to himself and says it was received April 8, 1911, in due course of mail.

(Letter offered in evidence and admitted as Plaintiff's "Exhibit 19.")

Witness reads therefrom: "Notre Dame d'Arvor. We note how you have established our claim against the receivers of the cargo, and same has our entire approval."

Witness shown letter addressed to the defendant without signature, dated March 21, 1913, with statement attached, and says that is the letter covering his account for these services, and that it is the original carbon copy remaining in his office since forwarding the letter, and is a true carbon copy of the original. Looks at statement attached and says that is a copy of his account mailed to the Societe covered by this letter; account for services rendered in the connection for which witness is now claiming under the complaint in the suit at bar; that the bill is for $10,000.00. (The Witness). I subsequently received an acknowledgement of that letter from the defendant.

(Papers and letters referred to by the witness offered in evidence and marked Plaintiff's "Exhibit 20.")

As to collection of freight on the cargo, witness testified:

The receivers of the cargo neglected to pay the freight, and I made repeated efforts to get them to make payments. The cargo continued to move off the dock and we placed a sort of friendly lien upon it, and that was disregarded, and the cargo still continued to be moved off

the dock and out of the custody of Balfour, Guthrie & Company, and out of the custody of R. V. Hinch & Company, until finally we were compelled in the interests of the Societe, to assert our lien. The efforts to get this freight, Your Honor, were very trying and embarrassing, especially dealing with such a high-class firm as Balfour, Guthrie & Company. They just deferred the matter from time to time until it got to a breaking point, and we had to do something so as to protect the Societe's interests. This trouble covered the period from September 1st, until about the end of November, when they came along and made tender of part of the freight.

Cross Examination.

I closed up my office in Seattle from October, 1910, to April, 1911, so far as my own particular services are concerned. My son was in my office in Seattle and advised me of everything that came along in the meantime. I made very few visits here; was not able to at all to my satisfaction to keep a hand on business here; as a matter of fact I have cited one point in which I lost $6,650.00 on one transaction.

HUME B. ROBINSON, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

On Direct Examination by Mr. Gorham.

My full name is Hume B. Robinson, residence Vancouver; occupation barrister-at-law, which I have followed since 1898. I have been a member of the bar of British Columbia since 1909; that is my exclusive occupation. I know Mr. Barnaby; was a member of the firm of Russell, Russell & Hannington until December 31, 1911. The litigation ended in May, 1911, but not altogether, the registrar's report was not in until the following January, 1912. There was a reference afterwards under the judgment of the court.

THE COURT: It was June 12th. He gave the date.

MR. GORHAM: June 12th was the last day in the complaint, but I think the account shows that the last service was rendered in April or May.

MR. KIEFER: April 12th.

(The Witness). I heard Mr. Barnaby's testimony this morning and this afternoon here in court, and remember

the litigation he has related; I was solicitor in the matter of that litigation for the defendant company, and Mr. J. A. Russell, Sr. member of our firm, was counsel. Mr. Barnaby consulted with both Mr. Russell and myself; as far as I remember we were in constant consultation with him during the whole litigation, taking his advice herein; he represented the owners and of course we took instructions from him. I can't answer on behalf of Mr Russell, but I know that for instance in the preparation of the statement of defense—in our courts we go very much on the pleadings filed in court during the progress of the case, and on our files—we can't go outside of our pleadings. Therefore the pleadings are a very important matter. The statement of defense in this case was a very important matter, and it was prepared by myself with Mr. Barnaby's assistance; and Mr. Russell of course passed upon it before it left the office. And throughout the whole, the same thing would apply to all steps in the case, throughout the case. We were always with Mr. Barnaby or Mr. Barnaby's agent. There was no other person upon whom our firm relied to guide and direct us in the prosecution. I have heard Mr. Barnaby testify as to the nature and extent of the services and so far as I know it was a correct statement. Of course the matter is five or six years old and I can't remember this perhaps as clearly as Mr. Barnaby can. But I remember this part, that Mr. Barnaby was in contant communication with us during the whole period of the litigation, either by letter or by personal attendance. And I remember we were well into the spring of 1911, from say January until the date of the trial—I think the date of the trial was the latter part of April or the first of May—and I think Mr. Barnaby was there all the time. He evidently thought he was up there all the time from necessity for the interest of his owners; I think so, because it was a peculiarly involved litigation; it was a litigation which was different from what we had had in our maritime courts before. When I was there we had several demurrage cases, but they were all cases of collision, which were comparatively simple matters.

THE COURT: I haven't got clearly yet, what the points in issue were.

Mr. Gorham: If Your Honor please, that is probably because this vessel passed through two casualties before she ever reached the west coast of America; and it was by reason of those casualties that a large part of this complication arose after the vessel arrived at British Columbia. She came into collision, in the English Channel, with the ship Raithwaite. She was obliged to go into port and discharge her cargo and have repairs. Suit was brought against her and the d'Arvor recovered some $40,000.00—successfully resisted the Raithwaite case, and recovered against the Raithwaite some $40,000.00. I think 8,000 pounds damages, resulting from the collision. She then started to go on her voyage with this cargo of cement, and came into collision with the breakwater off Falmouth and was obliged to put back into port and discharge her cargo and dock again; all of which required a considerable disbursement upon the part of the owners of the vessel and the other interests involved, all of which was subject to general average after the vessel arrived at her port of destination and discharged the cargo, which was after the vessel had deviated from her voyage to British Columbia. That all followed after the vessel arrived—the suit of Hind, Rolph & Company and Parrott & Company for damages to the cargo and then the complications arising from the failure to pay for freight. That is practically correct, is it not, Mr. Robinson, as you understand it?

A. As I understand it, yes.

Cross Examination by Mr. Kiefer.

When Mr. Barnaby rendered these services I was more or less familiar with what he was doing. I cannot remember that he was in Victoria and Vancouver continuously from the latter part of October until the latter part of December, 1910; I wouldn't like to say that. I know that we were successful in the prosecution of the litigation, and we thought it was due largely to Mr. Barnaby, that is my personal opinion. I found him very thorough, extremely so; I wouldn't like to say that he went into more details than I at the time thought necessary; we found that detail of great advantage to us. The case was unique in many ways, both to Mr. Russell and myself, and we had no precedent to work on. If you go through

our reports you wouldn't find a similar case in the reports. The local judge referred to the great difficulty he had in finding precedents. It was technical assistance we could not get from any one we knew of except Mr. Barnaby. Lots of ships might have agents here who would not have the high skill and experience that Mr. Barnaby had, and we drew upon that to the best of our ability.

WILLIAM HARVEY COPP, a witness sworn on behalf of plaintiff, testified as follows upon

Direct Examination by Mr. Gorham.

My full name is William Harvey Copp; am a retired ship master; followed the sea over sixty years, in the waters of the world, especially between 60 south and 60 north; sail and steam; built ships for many years; in New Brunswick, St. Johns and Bay of Fundy; all deep water ships; managed ships I built, went to sea with them; was managing owner of them, and went to sea, and chartered them. I reside in Vancouver at the present time; have been nautical assessor in some cases for the government about seven or eight months ago, and am pilot commissioner in the port of Vancouver; have had any amount of experience with litigation in reference to ships and shipping; have had my ship seized in New York and litigation involving ships I owned in and sailed. Was in court and heard the testimony of Mr. Barnaby on the witness stand in this case this day. As to the reasonable value of the services rendered by Mr. Barnaby to the owners as detailed by him on the witness stand, there seems to be a good deal of litigation in connection with it and a great deal of trouble, and I think his services should be reasonably worth between $5,000.00 and $6,000.00. I think that amount would be none too much for the trouble he has taken, as far as I can remember it. I don't know of any other ship's agents in British Columbia who could have discharged the services that Mr. Barnaby did for his owners.

Cross Examination by Mr. Kiefer.

I have prepared cases similar to this for trial, but not in connection with collisions, but I have prepared cases where they said I contracted to do an impossibility. In

Australia I remember one case in particular. I had the Harbor Commission against me and had everybody against me.

(Witness excused.)

JAMES R. STUART, a witness sworn on behalf of plaintiff, testified as follows: upon

Direct Examination by Mr. Gorham.

My full name is James R. Stuart; residence in Vancouver, B. C. I have been connected with ships and the sea since I was 14 years of age; have held a Master's certificate since 1881, a British Board of Trade certificate; includes both steam and sail, and everything else; I followed the sea about 40 years, six years in Vancouver and handled ship's interests ashore in Aberdeen, Scotland, as a ship broker and manager, ship owner, part owner, and managing owner of deep water vessels; five years and a half in ship broking. I don't do anything else in Vancouver but keep in touch with shipping interests; all the shipping interests in Vancouver. I followed Mr. Barnaby's services as detailed by him this morning and afternoon on the witness stand very closely; was in the courtroom all the time. Taking my own experience in Vancouver for the past six years that I have been connected with many shipping interests and difficulties and one thing and another, assisting counsel and knowing all the shipping people, I think I can honestly say that I do not know of any ship broker in Vancouver who could have performed the services that Mr. Barnaby has stated on the witness stand he performed for the defendant or understand all the technical parts of shipping which Mr. Barnaby seems to have gone through in this complicated case. I heard his testimony. In my opinion, taking into consideration everything that Mr. Barnaby testified to, the reasonable value of the services as he stated he rendered to the French Corporation, would be 1000 pounds. 1000 pounds sterling, English money, I think is a very legitimate figure.

Cross Examination by Mr. Kiefer.

I did not make any deduction. If the traveling expenses and telegraphic and natural incidental expenses had

already been paid: I think the services outside of these expenses were worth a 1000 pounds.

GORDON STEWART CURRIE, a witness sworn on behalf of plaintiff, testified as follows upon

Direct Examination by Mr. Gorham.

My full name is Gordon Stewart Currie; am a steamship agent and broker; reside in Seattle; conduct my business on the Grand Trunk Dock, Seattle; have followed that business since 1888; in London from 1888 until 1900; from 1888 to 1892 I was with Charles Johnson & Company, ship brokers, steamship agents, not ship owners, brokers and chartering agents, principally in the West Indies; from 1892 to 1895 was with H. Clarkson, London, steamship agents, brokers, insurance brokers, and chartering agents. In Charles Johnson's there were only four of us, but in H. Clarkson's office there were between 45 and 50 at the time I was there. I was boy in Charles Johnson's office, practically learned the grounding of the business there. In H. Clarkson's I was chartering clerk in the English department. From 1895 until 1898 I was with John Callender, ship brokers, as chartering clerk; then I was sent out to New York by the Federal Steam Navigation Company of London, to manage their New York office; they were ship owners, owning ten or twelve ships, sailing out of London to Australia and the Cape, and to New Zealand, and out of New York to the Cape, Australia and New Zealand. I was their New York manager from January, 1900, until July, 1907; after that I came out to Seattle with Hind, Rolph & Company, the same firm mentioned on the witness stand here. That is, it is the Seattle firm I was with, the firm you refer to is the San Francisco one, but the same people. I was employed by them as bookkeeper and chartering clerk. They are considered one of the finest houses on the Coast. Since 1910 I did business on my own account as steamship agent and broker, insurance broker. If a vessel comes this way and the owners send that vessel to a particular ship broker or ship agent, you may call it, and if the vessel is only chartered, that is coming here with a charter, it will be the agent's duty to look after the general working of that ship while in port. For instance if she is free of charter,

as regards the custom house, he will enter her in the custom house and in the consulate's office, and generally give the master the benefit of his experience in the port he is retained in, help him in all matters, clear her outward bound; that is the ordinary duty of the ship's agent. I heard Mr. Barnaby's testimony this morning and afternoon in this case, detailing the services that he rendered this French Corporation, Societe Nouvelle d'Armement; I would not call that services in the ordinary line of ship's agent.

"Q. What in your opinion would be the reasonable value of the services detailed by Mr. Barnaby to the French Societe.

Mr. Kiefer: I object to that. He has not shown himself qualified to answer that question. He has not shown that he was engaged in or had any knowledge of similar cases.

The Court: Overruled.

Mr. Kiefer: Exception.

The Court: Allowed.

A. On the evidence I have heard Mr. Barnaby give, I would say between six and seven thousand dollars."

Cross Examination by Mr. Kiefer.

I have prepared a similar case in New York, where I was loading a ship on the wharf for Sydney, Australia, a general cargo. She had hard case oil in her; I had the sanction of the Board of Marine Underwriters to load about 500 tons of flour in her, and the captain agreed to take it, and when the cargo came alongside he absolutely refused to do so, claiming that the fumes from the case oil might penetrate into the flour, although I had taken all precautions the underwriters had told me to take in the way of building a bulkhead and having the decks caulked. He refused to take it and on the instructions of my London principals I libeled the ship.

Redirect Examination by Mr. Gorham.

I have heard of the house of Went & Company of London. Witness shown bill for statement of fees of Went & Company rendered the defendant for his services in the

collision case of the Raithwaite for 400 pounds, occupying a period of about four months.

"THE COURT: They were ship's agents?

MR. GORHAM: They were ship agents in regard to the Notre Dame d'Arvor, and of the Societe, in England; and rendered this service during a period of about four months on this collision, that I referred to, that took place in the English Channel.

MR. KIEFER: Object to it on the ground that it is irrelevant and immaterial.

THE COURT: Its materiality does not seem apparent.

MR. KIEFER: There is no proof that that amount has ever been paid.

THE COURT: The objection will be overruled. But it is rather far-fetched.

Q. I will show you the bill, Mr. Currie, beginning on the second page, reading, "Our fee." Just see what the fee was charged for. I want to compare the value of services in England with the value of similar services here.

(Witness examines document.)

Q. State what is the relative value of like services in England and in British Columbia and in Seattle—for services of this character.

MR. KIEFER: I object to that as irrelevant and immaterial.

THE COURT: Objection overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

Q. Would they be higher or lower or practically the same?

A. Much higher. I should say in the ratio of two and a half to one.

Q. Much higher where?

A. Higher here.

Q. Than in England?

A. Than in England.

Q. So that for a service of similar character there would be charged much more than four hundred pounds. In the bill shown you, there is mention made of a recovery of eight thousand pounds for damage to the d'Arvor.

A. In England?

Q. In England. If that damage had been recovered for in the courts of this country on the basis of the same repairs required to be made in this case the recovery would be much larger than eight thousand pounds, wouldn't it?

A. Yes.

Q. It wouldn't be the same proportion, as you stated, with regard to services?

A. No, I don't know that it would, because labor does not carry so high as services carry.

Q. It would be two to one?

A. No.

Q. Close to it?

A. No, you can build a ship in England today for about one-half of what you can build here in the United States.

Q. I say the costs in England would be about one to two?

A. Yes.

Document referred to admitted in evidence and marked plaintiff's exhibit "21."

(Witness excused.)

J. R. Barnaby, recalled in his own behalf, testified on

Direct Examination by Mr. Gorham:

Shown bill, plaintiff's exhibit 21, and says I received this from the owners of the Societe, and that is the amount they paid their brokers in London on the collision.

Mr. Kiefer: Object to that as irrelevant.

The Court: Overruled.

Mr. Kiefer: Exception.

The Court: Allowed.

The Witness: Went & Company were ship's agents in that case.

George F. Thorndyke, a witness sworn on behalf of plaintiff, testified on

Direct Examination by Mr. Gorham:

My full name is George F. Thorndyke; reside in Seattle; am steamship and sailing vessel agent and broker; have been since 1901; handled sailing vessels and steamers operating from Pacific Coast to Atlantic Coast and on

the Pacific Coast; up to January, 1915, for others; since that time on my own account. I was with Globe Navigation Company only, since 1901, but prior to that I went into the employ of Dodwell & Company for three years as agent in Seattle and Alaska. I mean local managing agent for Seattle and Alaska. I have heard Mr. Barnaby's testimony here this morning and afternoon. I am familiar with the services of ship's agent of the character that he has detailed; have had experience with ship litigation. Upon being interrogated as to the reasonable value of plaintiff's services the witness was cross examined by Mr. Kiefer. I have prepared a case myself similar to the one described by Mr. Barnaby, not exactly like it; have prepared for trial probably five or six, maybe eight or ten cases, one of them particularly involving a very large amount.

Counsel for defendant objected to the question. Overruled. Thereupon the witness was asked this question by plaintiff's counsel:

"State what in your opinion is the reasonable value of the services rendered the French Societe, the defendant corporation as detailed by Mr. Barnaby," and answered the same, "I think fully as much as he has claimed herein, and anywhere between $5,000.00 or $6,000.00 is a fair compensation."

(Whereupon the plaintiff rested.)

"Mr. Kiefer: I won't take up any time with any opening statement. If the court please, it is agreed between counsel that a certification of the record in the Superior Court is waived, and I will offer in evidence the complaint, the answer, the reply, the findings of fact and conclusions of law, and the judgment entered by the Superior Court of King County, this district, in cause No. 104,397, in which the same party is plaintiff as is here plaintiff and the same defendant is defendant.

Mr. Gorham: I understood you were to offer a copy of the file.

Mr. Kiefer: I offer this copy.

Mr. Gorham: These are not the complete files, the papers you are offering. Jurisdiction was acquired by writ of garnishment.

MR. KIEFER: I agree to put that in. It is admitted that this case was begun by a writ of garnishment summoning Balfour, Guthrie & Company as garnishee, and the defendant appeared therein. There was a stipulation for the release of all funds in excess of one thousand dollars—all funds in the hands of the garnishee in excess of one thousand dollars.

MR. GORHAM: He did not appear until after the writ was issued. Is that correct?

MR. KIEFER: That is correct.

MR. GORHAM: I think we better have the garnishment papers; because it was by garnishment that the jurisdiction was obtained. If you will supply them afterwards, I am satisfied—consider that they will be supplied.

MR. KIEFER: Yes.

THE COURT: With that understanding they will be admitted.

MR. GORHAM: And the stipulation.

MR. KIEFER: Yes.

THE COURT: Within what time?

MR. KIEFER: I think if in time for the appeal will be sufficient. The writ of garnishment was served upon Balfour, Guthrie & Company. The defendant appeared and stipulated for the release of all funds in the hands of the garnishee in excess of one thousand dollars. I think that obviates the necessity of putting in those parts. However, if you find you want the copies, I will have copies made and have them put in.

Documents admitted in evidence and marked defendant's Exhib. "A."

In connection with the records just offered, it is admitted that the judgment was paid and fully satisfied, and that it is between the same parties as the parties in this case.

JAMES WARD, a witness sworn on behalf of defendant, testified as follows upon

Direct Examination by Mr. Kiefer:

My full name is James Ward; live in Tacoma; my occupation has been ship agent and ship broker; I am engaged in that at present; have been engaged in that in Tacoma for 26 years, and prior to that about as many

more mostly in England; have had experience in preparing marine cases in litigation; have prepared quite a number. The experience I have had in the getting up of evidence, assembling it, arranging it for trial in cases of marine litigation, which matters have been mostly personal, that is, I have been engaged in cases; have been a vessel owner; never followed the sea; my connection with shipping has been as a manager or investor. I heard as much of the testimony of Mr. Barnaby today as I could, being rather weak in hearing, of course I missed part of it. I followed the most of his testimony. The witness over the objection of Mr. Gorham for plaintiff, testified that, outside of all actual expenses in the way of telegrams, cables, traveling expenses, hotel expenses and all that sort of thing, in his opinion $500.00 or $600.00 would be reasonable for the services of Mr. Barnaby.

CHARLES JOLIVET, a witness sworn on behalf of the defendant, testified as follows on

Direct Examination by Mr. Kiefer:

I was a master mariner; followed the sea about 11 or 12 years, but since that time I have been engaged in ship brokerage and agency services, for ten or eleven years, here on Puget Sound and in San Francisco; I am familiar with the preparation of cases for trial involving shipping matters; have heard the testimony of Mr. Barnaby here today; and thereupon the witness was asked this question:

"Q. What in your judgment, Captain, is the reasonable value of Mr. Barnaby's services?

MR. GORHAM: We desire to ask the Captain a question or two before he answers that.

THE COURT: Very well.

Cross Examination.

By MR. GORHAM:

Q. You are the agent for the defendant corporation, in this suit at bar?

A. Yes.

Q. How long have you acted as such agent?

A. Three years.

Q. You are their resident agent at Seattle, in full charge of their business here?

A. Yes.
Q. Employ counsel to defend this suit?
A. Yes.

Redirect Examination.

By Mr. Kiefer:

Q. What in your judgment is the reasonable value of Mr. Barnaby's services as detailed by him on the stand?
A. Well, I think five hundred dollars is well paid.

(*No Cross Examination*)

Counsel for defendant thereupon rested, with the understanding that the amendment of the complaint in the case at bar to read "ship's agent" should not alter the force and effect of the judgment of the Superior Court as a bar, if it be otherwise a bar, that the term "ship's broker" should be considered by the court to mean the same as ship's agent. Counsel for plaintiff stated that this was the correct understanding.

The plaintiff was recalled by defendant for further question, and upon examination by Mr. Kiefer, testified:

That he was an agent for the defendant here in Seattle continuously up to about the time this difficulty arose early in 1912, to about April, 1912.

The Court: From what time?

A. 1907.

Rebuttal.

J. R. Barnaby, recalled as a witness on his own behalf testified as follows, on

Direct Examination by Mr. Gorham:

I was the plaintiff in question in No. 104,397, in the Superior Court, State of Washington, between myself and the Societe, and recovered a $1,000.00 judgment in that case. Witness shown paper marked for identification plaintiff's exhibit 22, and asked what it is, says: that is my account for average agency against the average interests chargeable to Parrott & Company, San Francisco. The bill says "Societe Nouvelle d'Armement, Dr., to J. R. Barnaby." That is right. This is a true copy of the bill as rendered to the defendant in my letter of March

31, 1913, plaintiff's exhibit 20, referred to in the first paragraph of that letter. "I also enclose my account for services rendered to you in general average agency, $1,000.00."

THE COURT: What exhibit is that?

MR. GORHAM: This is No. 22, if Your Honor please.

THE COURT: But the letter refers to two.

MR. GORHAM: Exhibit No. 20 refers to two bills. It refers to "account for services rendered to you general average agency, $1,000.00," and "also enclosed my statement to you," etc., etc. There were two statements in that letter. A copy of the statement for $10,000.00 is attached to the letter and a part of the exhibit. Plaintiff's No. 22 for identification is a copy of the other bill referred to in that letter.

Q. I will ask you if this bill was the basis of your complaint and recovery in the suit in the Superior Court?

MR. KIEFER: I object to that. That is incompetent. They sued for brokers' services, and they are bound by it, for a period embracing the period sued for in this case.

THE COURT: I will hear you on final argument on that. The objection will be overruled.

MR. KIEFER: Exception.

(*Last Question Read*)

A. Yes, it was.

Q. Was a copy of this bill submitted in the Superior Court suit?

A. Yes.

MR. KIEFER: Same objection.

THE COURT: Overruled.

MR. KIEFER: Let it be understood that all this examination goes in over my objection.

MR. GORHAM: Won't you admit it as a fact that our recovery of a thousand dollars was on this General Average bill?

MR. KIEFER: Yes, without admitting the materiality or competency of it, I will admit that that is the bill you offered evidence to support.

MR. GORHAM: Won't you admit that we offered no evidence touching any other service, in that suit?

MR. KIEFER: No, I won't admit that, because Mr.

Barnaby testified in extenso how much he went into it with those British Columbia lawyers."

THE WITNESS: I was present at the trial and was the main witness for the plaintiff in that trial. I alone had knowledge of the particulars of the facts upon which recovery could be had.

"Q. I will ask you if at that trial you testified in support of compensation for any services other than that involved in the General Agency?

MR. KIEFER: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Same ruling.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. Most certainly not.

Q. Your whole claim in that case.

THE COURT: That is rather leading.

Q. Did you or did you not testify in that case relative to receiving or not receiving instructions to render General Average Agency service?

A. I would like to have that question again.

(*Question Read*)

MR. KIEFER: I object to that on the same grounds.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. I received instructions.

Q. I am asking you if you testified?

A. I testified.

Q. Did you testify as to receiving instructions or as to not receiving instructions?

A. I testified as to receiving instructions.

Q. Were those instructions in writing or oral?

A. They were in writing.

Q. Have you a copy of that writing?

A. Yes.

Q. Now?

A. Yes.

Q. Did you produce a copy at that trial?

A. I did.

Q. Will you produce that copy here now, if you have it?

A. Yes.

Q. I show you letter dated 9th of September, 1910, from the defendant corporation to yourself addressed to Seattle. I guess you can pick out the part that refers to general average there, quicker than I can—if you will read the paragraph.

A. This letter, Your Honor, gives an outline of the general average necessity to be looked after, contains an implied if not—

Q. Just state what it contains?

A. A direct instruction to take charge of the general average matters and to do everything usual and necessary. It is the usual course which they follow and they say here "Of course it is a complicated affair, and it will be necessary to put this in the hands of capable adjusters, in order to have an equitable statement drawn up." That was my instructions.

Q. That was referring to the casualties in the English Channel.

A. That was referring to the average, the second average. And they said, "We rely upon your personal and best attention." That was solely in regard to the average.

Q. That was dated when?

A. That letter was dated the 9th of September, 1910.

Q. Before the vessel arrived here?

A. Just about the time the vessel arrived.

Q. Before she got into complications here?

A. Before she got into complications here, yes.

Q. I will ask you whether on the strength of that letter you rendered the General Average Agency services?

MR. KIEFER: We object to that as incompetent. You cannot contradict the record in the other case.

THE COURT: That is one of the questions I will hear you on finally. Objection overruled.

MR. KIEFER: Exception.

MR. GORHAM: We offer that in evidence. And the bill is offered.

Documents referred to admitted in evidence and marked Plaintiff's Exhibits "22" and "23."

(*Last Question Read*)

A. I did, and it is detailed in that bill for General Average Agency service, and that alone.

I first forwarded that bill for General Average Agency, a copy of which is here introduced as plaintiff's Exhibit 22, to the Average Adjuster in San Francisco, because it was a disbursement on the general average account to be included in the general average statement, to be collected from the ship, freight and cargo interests.

Q. From whom had you expected to receive a check in payment of the bill.

Mr. Kiefer: Same objection (as immaterial).

The Court: Overruled.

Mr. Kiefer: Exception.

A. From the insurance underwriters in San Francisco, through the Average Adjusters in the usual way.

The Court: Your position was that it was a lien on the same fund?

A. Yes, I sent it to them March 12, 1912, one year prior to writing this letter, one year prior to signing Exhibit 20, the letter of March 31, 1913. I waited a year for the payment of my general average agency bill by the underwriters, which should come from San Francisco. I was not paid by them and so testified in the former suit. After the expiration of that year I then forwarded a copy of that bill or of that account to the defendant in the action at bar on March 31, 1913, because it was probable that the Societe had collected my One Thousand Dollars, and at the time of so sending the bill to the Societe I sent them an account for services rendered in the libel case; separate and independent statement of account; I kept the accounts at all times absolutely separate; it was necessary to do so. The witness was then asked this question.

"Q. Were the acts whereby you discharged your function as General Average Agent the same acts whereby you discharged your function as ship's agent in the matters you testified to this morning?

Mr. Kiefer: Objected to as incompetent and immaterial.

The Court: Overruled.

Mr. Kiefer: Exception.

THE COURT: Allowed.

A. The acts were entirely different."

The general average agency services referred to are facts occurring prior to the arrival of the ship in Seattle, and the matters I testified to this morning and afternoon, for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle, and concern matters occurring after the arrival of the vessel, that is the line of demarcation. When I brought the first suit I did not know that the defendant corporation had an agent upon whom service of process could be had in the State of Washington. I filed a complaint against the Societe as a foreign corporation. A writ of garnishment was issued against Balfour, Guthrie & Company and served upon them. It was admitted that a complaint was filed and such a writ of garnishment issued and served.

Cross Examination by Mr. Kiefer:

The bill of my expenses was rendered in regard to the libel suit which is now pending. I did separate my expenses in my bills, I think in the testimony on that previous trial, I said I was not asking for any expenses upon the general average account; my expenses applied to the litigation in British Columbia only. My bills were kept entirely separate; they were separate accounts entirely.

THE COURT: That is separate not only for services but expenses?

A. Yes, Your Honor.

MR. KIEFER: Have you got any bills showing any such separation of expenses?

A. Why the bill for itself speaks to that, that was what you would pay into court on the previous case: that was perfectly clear.

Q. When you rendered your bill for extensions of protest, what were they for? What were extensions of protest used for, in general average or in litigation in British Columbia?

A. Well, the extensions of protest were used principally in the litigation in British Columbia. They were not used for the general average purposes. There might have been a slight correlation that is all. I was in Vancouver

and Victoria a little while on the general average matter, a few days and spent some money there. Witness shown bill rendered under date of July 26, 1911, and says that is for expense account only; there is no segregation of the bill, because it applies to this litigation. I did not say that the protest was used for the general average it had to do with the litigation there on the unseaworthiness of the ship; that question did not arise in general average. I testified in the other cause that I was in Vancouver and Victoria a few days; there was no traveling expenses for it in the average account; my traveling expenses and general expenses were included in the fee.

The defendant offers in evidence document referred to by witness, admitted and marked defendant's Exhibit "B."

Redirect Examination by Mr. Gorham:

I consulted counsel before I brought the first suit; the general average agency suit. You were my counsel. I directed and instructed my counsel to bring that suit.

"Q. Do you remember your counsel advising you as to the matter or the necessity of the court acquiring jurisdiction by service upon defendant.

MR. KIEFER: Objected to.

THE COURT: Overruled.

MR. KIEFER: Exception.

A. I was guided entirely by my counsel, I followed his advice implicitly.

Q. Did you state to your counsel at that time that this corporation had an agent upon whom service of process could be made?

MR. KIEFER: Same objection to that. That clearly is improper.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. Well, I might have done so. But I don't understand the legal technicalities of these matters.

Q. You as a matter of fact, your counsel and you, signed an affidavit for the issuance of a writ of garnishment?

A. Why, yes. I haven't sufficient knowledge along

those lines to do anything else. I am not a lawyer.

(Witness excused)."

"WILLIAM H. GORHAM, sworn as a witness on behalf of plaintiff testified as follows:

Direct Examination.

THE WITNESS: My name is William H. Gorham. I am an attorney at law, practicing at this bar for the last twenty-five or thirty years; that I was attorney for the plaintiff in the action at bar, in the action in the Superior Court, No. 104,397, and as such had sole charge of that litigation. Prior to the commencement of the suit the plaintiff visited my office and consulted with me with reference to bringing the suit, advising me at that time of two causes of action, one for a general average agency fee.

MR. KIEFER: I want to object to all that, if the court please, as irrelevant and immaterial, and as incompetent to contradict this record.

THE COURT: Overruled. Exception. Allowed.

THE WITNESS: A general average agency fee of a thousand dollars; the other a fee for ship's agency in the sum of ten thousand dollars, as shown by these exhibits respectively; and that at that time I inquired of him whether or not the defendant had an agent upon whom service of process could be had. And I was advised by Mr. Barnaby. After closely questioning him, that he did not know whether the person who was acting, or had been acting as agent for the vessel, was in fact authorized to act as such, and was an agent having the management of the defendant's business, sufficient management to warrant service of process upon it. And then I stated to plaintiff that if he brought an action against the company embracing both causes of action, upon both statements, the one thousand dollar statement and the ten thousand dollar statement, and served process upon Captain Jolivet, it might appear subsequently by Captain Jolivet's affidavit that he was not such an agent, or not the agent of a foreign corporation upon whom process could be had. And I advised him to bring the action upon his smaller claim and to garnishee Bal-

four, Guthrie & Company, if he was satisfied that any money in their hands belonged to the defendant company. And I was so instructed and brought the suit for the reason that after examination and interrogating my client I was not satisfied that we could take a chance in regard to bringing the suit upon both claims; that is, take a chance of acquiring jurisdiction by service of process upon Captain Jolivet. And, after the issuance of the writ of garnishment, and the service of that writ upon Balfour, Guthrie & Company, the defendant desiring to draw down whatever balance they might have in the hands of Balfour, Guthrie & Company, came to me and requested me to permit them to draw it down; and I then prepared a stipulation which set forth the fact that Captain Jolivet was the agent of this foreign corporation, and that the foreign corporation was doing business in the State of Washington. And the present counsel for the defendant, then counsel for the defendant, said to me that he had submitted that stipulation to Captain Jolivet and that Captain Jolivet had told him that it was correct. And, without stating to counsel for defendant the purpose of my including that paragraph of the stipulation in the stipulation, it was for the purpose of securing a statement upon the part of the defendant that it was doing business in this state, and that Captain Jolivet was its agent, or that it had an agent here, for the purpose of acquiring jurisdiction in a subsequent suit for the larger claim.

MR. GORHAM: We offer the stipulation in evidence. Here is a copy signed by both parties. It is not the one filed in court. It may be admitted?

MR. KIEFER: Sure.

THE COURT: It may be admitted.

Document referred to admitted in evidence and marked Plaintiff's Exhibit "24."

(Witness excused).

THE COURT: Anything further?

MR. GORHAM: That is all I believe, Your Honor.

MR. KIEFER: Nothing further on the part of the defense.

THE COURT: That is all of your evidence?

MR. GORHAM: We rest, if the court please. Testimony closed."

And thereupon upon oral argument Mr. Gorham, attorney for plaintiff, contended that under all the evidence in the case plaintiff was entitled to judgment, and Mr. Kiefer on behalf of defendant contended that his objection to the admission of any evidence in support of the complaint must be sustained, and the evidence stricken, and further that in any event under all the evidence in the case the defendant was entitled to judgment. The cause was taken under advisement by the court; briefs to be furnished by respective counsel and such briefs were thereafter furnished, in which briefs counsel maintained their aforesaid respective contentions.

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing entitled cause coming on regularly for hearing before the Court on this 8th day of December, 1916, the time duly designated by the Court for settling and certifying bill of exceptions therein, the plaintiff and defendant now appearing by their respective attorneys of record herein, and the said defendant having within the time extended by stipulations and orders of the court herein for that purpose, this cause having been by the Court continued for the purpose of proposing and settling bill of exceptions from the May, 1916, term at which it was tried, into the November, 1916, term, duly proposed the foregoing as a bill of exceptions in said action, and no amendments thereto having been proposed by the plaintiff, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action.

Now, it is by the Court and the Judge of said Court, presiding at the trial of said cause ORDERED and CERTIFIED that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with the exhibits of the plaintiff therein referred to, to-wit, plaintiff's exhibits 1 to 24 inclusive, and defendant's exhibits "A" and "B", includes all the material facts and evidence herein, and is correct in all respects, and is hereby ap-

proved, allowed and settled and made a part of the records herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

EDWARD E. CUSHMAN,
Judge.

O. K., WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 8, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Assignment of Errors.

Now on this 7th day of December, 1916, comes the defendant by its attorney James Kiefer, and says: That the judgment entered in the above cause on the 2nd day of October, 1916, is erroneous and unjust.

First. Because it adjudges that the said plaintiff shall recover the sum of five thousand thirty-three dollars and thirty-three cents ($5,033.33) against the said defendant.

Second. Because it adjudges that the said plaintiff shall recover of and from the defendant any sum.

Third. Because the evidence was insufficient to support or justify the finding and judgment rendered in said cause on the 2nd day of October, 1916.

Fourth. Because the court erred in overruling the objection of the defendant to the reception or introduction of any evidence to support the plaintiff's complaint.

Fifth. Because the evidence upon the trial of said cause shows that the plaintiff's cause of action was barred

at the time of the commencement of this action by the statute of limitations of the State of Washington.

Sixth. Because the undisputed evidence in the case shows that the cause of action set up in plaintiff's complaint herein was merged in and barred by the judgment entered in the Superior Court of King County, Washington, in cause No. 104,397, of the files of said Court as shown by defendant's exhibit "A" introduced herein.

Seventh. Because the undisputed evidence in the case shows that the plaintiff recovered, or ought to, or should have recovered, and would in law recover all of his claims and demands against this defendant for which he has herein sued, in that certain action in the Superior Court of King County, Washington, wherein the plaintiff herein is plaintiff and the defendant herein is defendant, being No. 104,397 of the files of said Superior Court, as shown by Defendant's exhibit "A" introduced in evidence herein on the trial.

Eighth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: GORDON STEWART CURRIE. Q. What in your opinion would be the reasonable value of the services detailed by Mr. Barnaby to the French Societe? MR. KIEFER. I object to that. He has not shown himself qualified to answer that question. He has not shown that he was engaged in or had any knowledge of similar cases. THE COURT. Overruled. MR KIEFER. Exception. THE COURT. Allowed. A. On the evidence I have heard Mr. Barnaby give, I would say between six and seven thousand dollars.

Ninth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: Q. State what is the relative value of like services in England and in British Columbia and in Seattle—for services of this character. MR. KIEFER. I object to that as irrelevant and immaterial. THE COURT. Objection overruled. MR. KIEFER. Exception. THE COURT. Allowed. Q. Would they be higher or lower or practically the same? A. Much higher. I should say in the ratio of two and a half to one.

Tenth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: J. R. BARNABY. Shown bill, Plaintiff's Exhibit "21," and says I received this from the owners of the Societe, and that is the amount they paid their brokers in London on the collision. MR. KIEFER. Object to that as irrelevant. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed.

Eleventh. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. I will ask you if at that trial you testified in support of compensation for any services other than that involved in the General Agency? MR. KIEFER. I object to that as incompetent, irrelevant and immaterial. THE COURT. Same ruling. MR. KIEFER. Exception. THE COURT. Allowed. A. Most certainly not.

Twelfth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Did you or did you not testify in that case relative to receiving or not receiving instructions to render General Average Agency service? A. I would like to have that question again. (Question read). MR. KIEFER. I object to that on the same grounds. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. I received instructions. Q. I am asking you if you testified? A. I testified.

Thirteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. I will ask you whether on the strength of that letter you rendered the General Average Agency services? MR. KIEFER. We object to that as incompetent. You cannot contradict the record in the other case. THE COURT. That is one of the questions I will hear you on finally. Objection overruled. MR. KIEFER. Exception. MR. GORHAM. We offer that in evidence. And the bill is offered, and admitted as plaintiff's exhibits "22" and "23." (Last question read). A. I did, and it is detailed in that bill for General Average Agency service, and that alone. I first forwarded the bill

for General Average Agency, a copy of which is here introduced as plaintiff's exhibit "22," to the Average Adjuster in San Francisco, because it was a disbursement on the general average account to be included in the general average statement, to be collected from the ship, freight and cargo interests.

Fourteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. From whom had you expected to receive a check in payment of the bill? MR. KIEFER. Same objection. (As immaterial). THE COURT. Overruled. MR. KIEFER. Exception. A. From the insurance underwriters in San Francisco, through the average adjusters in the usual way.

Fifteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Were the acts whereby you discharged your function as General Average Agent the same acts whereby you discharged your function as ship's agent in the matters you testified to this morning? MR. KIEFER. Objected to as incompetent and immaterial. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. The acts were entirely different. The general average agency services referred to facts occurring prior to the arrival of the ship in Seattle, and the matters I testified to this morning and afternoon, for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle, and concern matters occurring after the arrival of the vessel, that is the line of demarcation. When I brought the first suit I did not know that the defendant corporation had an agent upon whom service of process could be had in the State of Washington. I filed a complaint against the Societe as a foreign corporation. A writ of garnishment was issued against Balfour, Guthrie & Company and served upon them. It was admitted that a complaint was filed and such a writ of garnishment issued and served.

Sixteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Do you remember your

counsel advising you as to the matter of the necessity of the court acquiring jurisdiction by service upon defendant? MR. KIEFER. Objected to. THE COURT. Overruled. MR. KIEFER. Exception. A. I was guided entirely by my counsel, I followed his advice implicitly.

Seventeenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Did you state to your counsel at that time that this corporation had an agent upon whom service of process could be made? MR. KIEFER. Same objection to that. That clearly is improper. THE COURT. Overruled. MR KIEFER. Exception. THE COURT. Allowed. A. Well, I might have done so. But I don't understand the legal technicalities of these matters.

Eighteenth. That the court erred in overruling the objection of the defendant to the testimony given by the witness Gorham on behalf of the plaintiff. MR. KIEFER. I want to object to all that, if the court please, as irrelevant and immaterial, and as incompetent to contradict this record. THE COURT. Overruled. Exception. Allowed. THE WITNESS. A general average agency fee of a thousand dollars; the other a fee for ship's agency in the sum of ten thousand dollars, as shown by these exhibits respectively; and that at that time I inquired of him whether or not the defendant had an agent upon whom service of process could be had. And I was advised by Mr. Barnaby after closely questioning him, that he did not know whether the person who was acting, or had been acting as agent for the vessel, was in fact authorized to act as such, and was an agent having the management of the defendant's business, sufficient management to warrant service of process upon it. And then I stated to plaintiff that if he brought an action against the company embracing both causes of action, upon both statements, the one thousand dollar statement and the ten thousand dollar statement, and served process upon Captain Jolivet, it might appear subsequently by Captain Jolivet's affidavit that he was not such an agent, or not the agent of a foreign corporation upon whom process could be had. And I advised him to bring the action upon his smaller claim and to garnishee Balfour, Guthrie & Company, if he was

satisfied that any money in their hands belonged to the defendant company. And I was so instructed and brought the suit for the reason that after examination and interrogating my client I was not satisfied that we could take a chance in regard to bringing the suit upon both claims; that is, take a chance of acquiring jurisdiction by service of process upon Captain Jolivet. And, after the issuance of the writ of garnishment, and the service of that writ upon Balfour, Guthrie & Company, the defendant desiring to draw down whatever balance they might have in the hands of Balfour, Guthrie & Company, came to me and requested me to permit them to draw it down; and I then prepared a stipulation which set forth the fact that Captain Jolivet was the agent of this foreign corporation, and that the foreign corporation was doing business in the State of Washington. And the present counsel for the defendant, then counsel for the defendant, said to me that he had submitted that stipulation to Captain Jolivet and that Captain Jolivet had told him that it was correct. And, without stating to counsel for defendant the purpose of my including that paragraph of the stipulation in the stipulation, it was for the purpose of securing a statement upon the part of the defendant that it was doing business in this state, and that Captain Jolivet was its agent, or that it had an agent here, for the purpose of acquiring jurisdiction in a subsequent suit for the larger claim.

WHEREFORE, the defendant prays that said judgment be reversed and the District Court directed to dismiss said action as prayed in the answer herein.

JAMES KIEFER,
Attorney for Defendant.

Copy of above assignment of error received, and due service of same acknowledged this 7th day of December, A. D. 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. Barnaby, Plaintiff,
vs.
Societe Nouvelle d'Armement, Defendant. } No. 3241

Supersedeas Bond.

Know All Men By These Presents, that we, Societe Nouvelle d'Armement, a corporation, the above named defendant, as principal, and the United States Fidelity & Guaranty Company, a body corporate, duly incorporated under the Laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto J. R. Barnaby, the above named plaintiff, in the sum of six thousand ($6,000.00) dollars, to be paid to said plaintiff, his executors, administrators and assigns, for which payment well and truly to be made, we bind ourselves, our and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 7th day of December, 1916.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the said defendant and in favor of plaintiff in the sum of five thousand thirty-three dollars and thirty-three cents ($5,033.33) with plaintiff's costs and disbursements; and

Whereas, the said defendant has obtained from said court a writ of error to reverse the judgment in said action and a citation directed to the plaintiff is about to be issued citing and admonishing him to be and appear in the United States Circuit Court of Appeals, for the Ninth circuit, to be held at San Francisco, in the State of California:

Now, Therefore, if the said defendant, Societe Nouvelle d'Armement, a corporation, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its

plea good, then the above obligation to be void, otherwise to remain in full force and effect.

SOCIETE NOUVELLE D'ARMEMENT,
By JAMES KIEFER,
(SEAL) *Its Attorney.*

United States Fidelity and Guaranty Co. By John C. McCollister, Attorney in Fact.

The sufficiency of the surety on the foregoing bond approved by me on this 7th day of December, 1916.

JEREMIAH NETERER,
Judge of Said Court.

Copy of within Supersedeas Bond received, and due service of same acknowledged this 7th day of December, 1916.

WILLIAM H. GORHAM,

O. K. as to amount of surety. William H. Gorham, December 7, 1916.
Attorney for Plaintiff.

Indorsed: Supersedeas Bond. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Order Directing the Clerk to Transmit Original Exhibits.

In this cause upon stipulation of the parties, and it appearing to the court to be a proper case therefor, it is by the court ORDERED, that the clerk do transmit to the clerk of the Appellate Court the original exhibits offered and filed by the parties upon the trial of this cause.

Done in open court December 11, 1916.

JEREMIAH NETERER,
Judge.

Indorsed: Order Directing the Clerk to Transmit Original Exhibits. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 11, 1916, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

UNITED STATES OF AMERICA } ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between J. R. Barnaby, plaintiff, and Societe Nouvelle d'Armement, a corporation, defendant, a manifest error hath happened, to the great damage of the said Societe Nouvelle d'Armement, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit of Appeals for the Ninth Circuit, at the courtrooms of the said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same before the justice aforesaid, on the 6th day of January, 1917, that the record and proceedings aforesaid, being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 7th day of December, in the year of our Lord one thousand

nine hundred and sixteen, and the Independence of the United States the one hundred and forty-first.

(Seal) FRANK L. CROSBY,

Clerk of Said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

JEREMIAH NETERER,

United States District Judge, for the Western District of Washington.

Copy of within writ of error received and due service of same acknowledged this 7th day of December, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: No. 3241. In the United States District Court, for the Western District of Washington, Northern Division, J. R. Barnaby, Plaintiff, vs. Societe Nouvelle d'Armement, Defendant. Writ of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,
vs.
SOCIETE NOUVELLE D'ARMEMENT, Defendant. } No. 3241

Citation.

UNITED STATES OF AMERICA,
To J. R. BARNABY, } ss.

GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 6th day of January, 1917, pursuant to a writ of error filed in the clerk's office of the

District Court of the United States, for the Western District of Washington, Northern Division, wherein Societe Nouvelle d'Armement, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 7th day of December, 1916.

(Seal) JEREMIAH NETERER,
United States District Judge for the Western District of Washington.
Attest: FRANK L. CROSBY,
Clerk of Said United States District Court for the Western District of Washington.

By.....
Deputy.

We hereby, this 7th day of December, 1916, acknowledge service of the foregoing Citation at the City of Seattle, Washington.

WILLIAM H. GORHAM,
Attorney for said J. R. Barnaby.

Received copy of the foregoing Citation lodged with me for defendant in error this 7th day of December, 1916.

FRANK L. CROSBY,
Clerk of Said United States District Court.

Indorsed: No. 3241. In the United States District Court, for the Western District of Washington, Northern Division, J. R. Barnaby, Plaintiff, vs. Societe Nouvelle d'Armement, Defendant. Citation. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James Kiefer for Defendant. Suite 327 Colman Bldg., Seattle.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. Barnaby, Plaintiff,
vs.
Societe Nouvelle d'Armement, Defendant. } No. 3241

Praecipe for Printing.

To The Clerk of The Above Entitled Court:

You will please have printed under the statute, and when printed certify as the record of this cause, the following papers: Complaint, summons and return, answer, reply, stipulation waiving jury trial, opinion of the trial court, finding, judgment, petition for new trial, order denying petition for new trial, petition for writ of error, order granting writ of error, writ of error "original only," assignments of error, citation "original only," bill of exceptions, and supersedeas bond, this praecipe.

James Kiefer,
Attorney for Defendant, and Plaintiff in Error.

Copy of within Praecipe received and service of same acknowledged this 11th day of December, 1916.

William H. Gorham,
Attorney for Plaintiff.

Indorsed: Praecipe for Printing. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 11, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

J. R. Barnaby, Plaintiff,
vs.
Societe Nouvelle d'Armement, Defendant. } No. 3241

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington, } ss.

I, Frank L. Crosby, Clerk of the United States District

Court, Western District of Washington, do hereby certify the foregoing 77 printed pages, numbered from 1 to 77, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 305 folios at 15c	$45.75
Certificate of Clerk to transcript of record, 4 folios at 15c	.60
Seal to said Certificate	.20
Certificate of Clerk to original exhibits, 3 folios at 15c	.45
Seal to said Certificate	.20
Total	$47.20

I hereby certify that the above cost for preparing and certifying record amounting to $47.20, has been paid to me by James Kiefer, Esq., attorney for Plaintiff in Error.

I further certify that I hereto attach and herewith trans-

mit the original Writ of Error and original Citation issued in this cause.

In Witness Whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said district, this 2nd day of January, 1917.

Frank L. Crosby,
(Seal) *Clerk U. S. District Court.*